IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 30 1996

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 95-C-831-K

SANDRA SHARPE,

Defendant.

FILED

SEP 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

This action, filed for the purpose of conducting an asset hearing regarding a foreign judgment, has been inactive for over one year. The United States Attorney's Office has advised the case may be administratively closed. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that further litigation is necessary.

ORDERED this 26 day of September, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE HAFF,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

No. 96-CV-674-K
(consolidated for discovery with 96-CV-91-B)

ORDER

This matter comes before the Court on Defendants' motion for voluntary dismissal on behalf of Plaintiff Joe Haff. (Docket #43 in case no. 96-CV-91-B). Defendants state that in his sworn statement taken on September 10, 1996, Plaintiff expressed his desire to dismiss this action against Defendants. The Court also notes that Plaintiff has failed to provide a motion to proceed in forma pauperis and summons and Marshal forms for service on Defendants as set out in this Court's letter of August 13, 1996.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss is GRANTED and that the complaint filed by Joe Haff on July 24, 1996, is hereby DISMISSED WITHOUT PREJUDICE.

SO ORDERED this 26 day of September, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEONARD RENAL ROBERTS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-690-K

ORDER

This matter comes before the Court on Respondent's status reports filed on September 10 and September 23, 1996.

On June 12, 1996, the Court stayed this action for ninety days to allow Respondent sufficient time to grant Petitioner de novo Probable Cause and Executive Parole Revocation Hearings. Respondent informs the Court that Petitioner was granted the above hearings on August 20 and September 5, 1996, respectively.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's request for habeas relief on the ground that he was denied the right to present witnesses and evidence at his Probable Cause Hearing and that an Executive Parole Revocation Hearing was held in his absence is DISMISSED WITH PREJUDICE.

SO ORDERED THIS 26 day of September, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

43

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
SEP 3 1996

RONNIE ENLOW,

Plaintiff,

vs.

THE HONORABLE PATRICK MOORE,

Defendant.

Case No. 95-C-1047-K

FILED
SEP 27 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are the motion of the plaintiff for summary judgment and the motion of the defendant to dismiss. Plaintiff brought the present action primarily seeking an injunction against defendant Moore, a District Judge of the Muscogee (Creek) Nation. Plaintiff, a non-Indian, owns a tract of land in Creek County, Oklahoma, which he contends is not restricted Indian land. However, plaintiff's tract apparently adjoins other tracts owned by three members of the Creek Nation, which are restricted Indian land. A boundary line dispute has arisen. The owners of the restricted land filed a quiet title action in the Muscogee (Creek) Nation District Court (hereafter "the tribal court") against the plaintiff. The tribal court case was assigned to defendant.

In the tribal court, plaintiff filed an objection to jurisdiction, which was denied. He appealed that decision to the Supreme Court of the Muscogee (Creek) Nation, which upheld the

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tribal court's decision that it had jurisdiction. Plaintiff then filed his own quiet title action in the District Court of Creek County (hereafter "the state court"). During the pendency of the state court action, plaintiff filed this federal action, seeking an injunction of the tribal court and a directive that the underlying litigation proceed in state court. The state court has held its proceedings in abeyance pending a decision of this Court.

Plaintiff now moves for summary judgment on the basis that the jurisdiction of the tribal court is limited to jurisdiction over Indian territory. Defendant responds with a motion to dismiss, on the ground plaintiff has not exhausted his tribal remedies, i.e., the fact question of whether the disputed boundary line impinges upon Indian territory must be first resolved in the tribal court.

The parties do not dispute general principles. In National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985), the Supreme Court held that a federal court is empowered to determine under 28 U.S.C. §1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. See Superior Oil Co. v. United States, 798 F.2d 1324, 1328 (10th Cir.1986). National Farmers also established the tribal abstention doctrine, requiring courts to abstain from exercising this federal question jurisdiction until tribal remedies have been exhausted "unless the 'assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate

opportunity to challenge the court's jurisdiction." Texaco, Inc. v. Hale, 81 F.3d 934, 936 n.2 (10th Cir.1996). Plaintiff's factual allegations do not establish any of the cited exceptions to the exhaustion rule. See generally Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1301 (8th Cir.1994), cert. denied, 115 S.Ct. 779 (1995)("Absent any indication of bias, we will not presume the Tribal court to be anything other than competent and impartial.")

The parties do dispute whether exhaustion of tribal remedies has occurred. Defendant contends, because this case involves a property dispute, the factual issues must be litigated on the merits in the tribal court before exhaustion may be said to have taken place. Plaintiff responds he has already pursued his argument to the highest tribal court. In the written opinion of the Supreme Court of the Muscogee (Creek) Nation regarding plaintiff's appeal, that body stated "it is the opinion of the . . . Court that the property in question is located within the boundaries of the Muscogee (Creek) Nation and that the property is Indian Country. . . . " At first blush, it appears the primary issue of whether the dispute involves "Indian country"[1] has been litigated through the appellate level, and plaintiff has sufficiently exhausted his tribal remedies. Cf. Yellowstone County v. Pease, _____ F.3d _____, 1996 WL 512363 (9th Cir.1996).

However, the appeal to the Supreme Court of the Muscogee

[1]See 18 U.S.C. §1151. The statutory definition applies to both criminal and civil jurisdiction. Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540 & n.10 (10th Cir.1995).

(Creek) Nation in this case was of an interlocutory nature. The factual determination as to where the boundary line will be drawn has not been litigated. One of the policy reasons supporting the tribal abstention doctrine is "the orderly administration of justice would be advanced by allowing the tribal courts to develop a full record." Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1536 (10th Cir.1995). See also Burlington Northern R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir.1991) ("[T]he tribe itself is in the best position to develop the necessary factual record for disposition on the merits.")

To the Court's surprise, it has been unable to locate decisions addressing the issue of a "boundary line" dispute in a quiet title action which implicates Indian country. Defendant quotes the statement from Santa Clara Pueblo v. Martinez, 436 U.S. 63, 65 (1978) that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" (emphasis added). Defendant argues this broad language encompasses determining boundary disputes between Indian and non-Indian land. Plaintiff responds with the indisputable assertion "[t]he tribal courts . . . have no jurisdiction to determine title to lands which are not Indian lands" (Plaintiff's Brief at 9).

At some point, a trial court must hear evidence in this case and determine a proper boundary line. This Court may not do so, as federal courts have no general jurisdiction over quiet title

actions.[2] Oklahoma state courts have jurisdiction to hear quiet title actions, but in a boundary line dispute involving Indian country, this presumably must be viewed as a sort of "concurrent jurisdiction" with the tribal court. This Court cannot pronounce that the state court or the tribal court has exclusive jurisdiction over this particular dispute, because the setting of the boundary line determines the extent of jurisdiction. Rule 30 of the Rules for the District Courts of Oklahoma provides that the judgment of an Indian tribal court will be granted full faith and credit in state court if the tribal court that issued the judgment grants reciprocity to judgments of the state court. See Barrett v. Barrett, 878 P.2d 1051 (Okla.1994). It is undisputed the Muscogee Nation grants such reciprocity. (See Exhibit 6 to Defendant's Combined Response). The "race to the courthouse" implications of this policy are beyond the purview of this Court.

Justice Stevens stated in his separate opinion in Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) that "only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a tribal court." Id. at 21 (Stevens, J., concurring in part and dissenting in part). Based upon the present record, this Court cannot definitively rule upon the jurisdictional issue and an injunction should not issue.[3]

---

[2]The Quiet Title Act, 28 U.S.C. §2409a, declares: "This section does not apply to trust or restricted Indian lands. . . ."

[3]The plaintiff's brief argument that an Indian tribe is a effectively a foreign sovereign and therefore subject to international law, is contrary to authority. See Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir.1992).

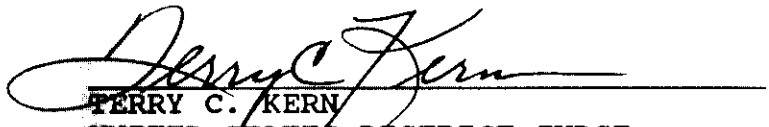
Also, since factual issues remain to be determined, the Court sees no alternative but to dismiss for failure to exhaust tribal remedies. "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." Crawford v. Genuine Parts, Co., 947 F.2d 1405, 1407 (9th Cir.1991), cert. denied, 502 U.S. 1096 (1992).

Upon development of a complete factual record, the tribal court's determination of tribal jurisdiction "is ultimately subject to review. If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court." LaPlante, 480 U.S. at 19. Plaintiff might ultimately prevail in tribal court, whether at trial or on appeal, thereby abrogating the need for further litigation.[4] If he does not, he may return to federal district court and argue, based upon the developed record, that the tribal court exceeded its jurisdiction. At that time, the federal court would be authorized to review the matter, applying the standard recently articulated in Mustang Production Co. v. Harrison, _____ F.3d _____, 1996 WL 477560 (10th Cir.1996).

[4]Plaintiff is also not precluded from proceeding with his own pending action in state court.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#5) is hereby DENIED. The motion of the defendant to dismiss (#11) is hereby GRANTED. This action is hereby dismissed without prejudice pending exhaustion of remedies.

ORDERED THIS 26 DAY OF SEPTEMBER, 1996.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE PAUL MIHOS,

Plaintiff,

vs.

CONNECTICUT MUTUAL LIFE INSURANCE CO.,

Defendant.

Case No.: 95-C-821-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST DEFENDANT CONNECTICUT MUTUAL LIFE INSURANCE CO.

COME NOW the Plaintiff, George Mihos, and the Defendant, Connecticut Mututal Life Insurace Co., and hereby stipulate that the action against this Defendant be dismissed with prejudice.

GEORGE MIHOS, plaintiff

DAVID HUMPHREYS, OBA #12346
THE HUMPHREYS LAW FIRM
1602 S. Main Street, Suite A
Tulsa, Oklahoma 74119-4455
(918) 584-2244
ATTONEYS FOR PLAINTIFF

GEORGE GIBBS, OBA #11843
HOPKINS AND GIBBS
4606 South Garnett, Suite 310
Tulsa, Oklahoma 74146
(918) 664-7292

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BIZJET INTERNATIONAL SALES & SUPPORT, INC., an Oklahoma corporation,

Plaintiff,

vs.

ALLIEDSIGNAL INC., a Delaware corporation;

and

CARLISLE ENTERPRISES, L.P., a California limited partnership,

and

UNC INCORPORATED, a Delaware corporation,

Defendants.

Case No. 96 CV 811K

FILED

SEP 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL WITHOUT PREJUDICE OF THE DEFENDANT CARLISLE ENTERPRISES, L.P.

The plaintiff, BizJet International Sales & Support, Inc., hereby dismisses without prejudice its claims against the defendant Carlisle Enterprises, L.P. This dismissal does not affect the continuation of plaintiff's claims against the defendants AlliedSignal Inc. and UNC Incorporated, and is filed concurrently with an Amended Complaint substituting CFC Aviation Services, L.P. d/b/a Garrett Aviation Services for Carlisle Enterprises, L.P.

Respectfully submitted,

Joel L. Wohlgemuth, OBA #9811
John E. Dowdell, OBA #2460
William W. O'Connor, OBA #13200
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR THE PLAINTIFF, BIZJET INTERNATIONAL SALES & SUPPORT, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 1996, a true and correct copy of the foregoing instrument was hand-delivered to:

Donald L. Kahl, Esq.
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, OK 74103-3708

Joel L. Wohlgemuth

bj.as.notdis/psa

FILED

SEP 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

McNABB COAL COMPANY, INC.,

Plaintiff,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Defendants.

Civil Action
No. 88-C-281-E
No. 88-C-1525-E
(consolidated)

ENTERED ON DOCKET

DATE SEP 30 1996

ORDER APPROVING SETTLEMENT AND DISMISSING CASE

Upon the joint motion of the Secretary of the Interior, McNabb Coal Company, Inc., and D. Frank McNabb, and for good cause shown, the Settlement Agreement dated August 30, 1996, between the Movants, Tri-State Insurance Company, Mid-Continent Casualty Company, and the Oklahoma Department of Mines is approved by the court. Therefore, consistent with the agreement of the settling entities, **IT IS FURTHER ORDERED:**

(1) That the Permanent Injunction filed May 31, 1994, is terminated;

(2) That the movants and all parties in this action shall bear their own litigation costs, including attorneys' fees.

(3) That this case is dismissed with prejudice;

JAMES O. ELLISON
United States District Judge

Prepared By:

STEPHEN C. LEWIS
UNITED STATES ATTORNEY

By: _____
PHIL PINNELL
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma
(918) 581-7670

and

GERALD A. THORNTON, Attorney
U.S. Department of the Interior
Office of the Field Solicitor
530 South Gay Street, Room 308
Knoxville, Tennessee 37902
(423) 545-4294

_____
KEN RAY UNDERWOOD
525 S. Main St., Suite 680
Tulsa, Oklahoma 74103
Counsel for McNabb Coal Co., Inc.
(918) 582-7447

_____
G. MICHAEL LEWIS
RUSSELL W. KROLL
Doerner, Saunders, Daniel & Anderson
320 S. Boston Avenue, Suite 500
Tulsa, Oklahoma 74103
Counsel for D. Frank McNabb
(918) 582-1211

ENTERED ON DOCKET
DATE 9-30-96

FILED

SEP 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 96-C-423H
SHARI L. BITTICK, Defendant.	)	

AGREED JUDGMENT

This matter comes on for consideration this 26th day of ~~June~~ September, 1996, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Shari L. Bittick, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Shari L. Bittick, acknowledged receipt of Summons and Complaint on May 24, 1996. The Defendant has not filed an Answer but in lieu thereof has agreed that Shari L. Bittick is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Shari L. Bittick in the principal amount of $4,527.42, plus accrued interest in the amount of $1,425.40 as of April 9, 1996, plus interest thereafter at the rate of 9% per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 23 U.S.C. § 3011, plus filing fees in the amount of $120.00 as provided by 28 U.S.C. §

2412(a)(2), plus interest thereafter at the legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of $4,527.42, plus accrued interest in the amount of $1,425.40 as of April 9, 1996, plus interest thereafter at the rate of 9% per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 23 U.S.C. § 3011, plus filing fees in the amount of $120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the legal rate until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

LORETTA F. RADFORD
Assistant United States Attorney

Shari L. Bittick

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 9-30-96

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

WILLIAM AARON DILLON, JR.
aka William A. Dillon, Jr.;
LINDA K. DILLON;
COUNTY TREASURER, Washington County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,

Defendants.

FILED

SEP 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 96-CV-496-H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26TH day of September, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, **County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma**, appear by Thomas Janer, Assistant District Attorney, Washington County, Oklahoma; and the Defendants, **William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **William Aaron Dillon, Jr. aka William A. Dillon, Jr.**, executed a Waiver of Service of Summons on July 2, 1996; that the Defendant, **Linda K. Dillon**, executed a Waiver of Service of Summons on July 2, 1996; that the Defendant, **County Treasurer, Washington County, Oklahoma**, was served on June 5, 1996 by certified mail, return

receipt requested, delivery restricted to the addressee; that the Defendant, **Board of County Commissioners, Washington County, Oklahoma**, was served on June 5, 1996 by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, **County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma**, filed their Answer on or about June 13, 1996; that the Defendants, **William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **LOT TWELVE (12), BLOCK TWENTY-EIGHT (28), OAK PARK VILLAGE, SECTION II, BARTLESVILLE, WASHINGTON COUNTY, OKLAHOMA.**

The Court further finds that on September 21, 1994, William Aaron Dillon, Jr. and Linda K. Dillon executed and delivered to West Star Financial Corporation their mortgage note in the amount of $31,858.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, William Aaron Dillon, Jr. and Linda K. Dillon, husband and wife, executed and delivered to West Star Financial Corporation a real estate mortgage dated September 21, 1994, covering the above-described property, situated in the State of Oklahoma, Washington

County. This mortgage was recorded on September 29, 1994, in Book 0882, Page 3062, in the records of Washington County, Oklahoma.

The Court further finds that on October 10, 1995, West Star Financial Corporation assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on October 23, 1995, in Book 0889, Page 2360, in the records of Washington County, Oklahoma.

The Court further finds that on November 22, 1995, William A. Dillon, Jr. and Linda K. Dillon executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on that date was made principal and the interest rate was changed to 7 percent per annum.

The Court further finds that the Defendants, **William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon,** made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon**, are indebted to the Plaintiff in the principal sum of $33,810.86, plus administrative charges in the amount of $385.00, plus penalty charges in the amount of $64.16, plus accrued interest in the amount of $823.92 as of February 16, 1996, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $113.00 ($105.00 fee for abstracting, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Washington County, Oklahoma**, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against Defendants, **William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon**, in the principal sum of $33,810.86, plus administrative charges in the amount of $385.00, plus penalty charges in the amount of $64.16, plus accrued interest in the amount of $823.92 as of February 16, 1996, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus the costs of this action in the amount of $113.00 ($105.00 fee for abstracting; $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Washington County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding

him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> First:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
>
> Second:
> In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

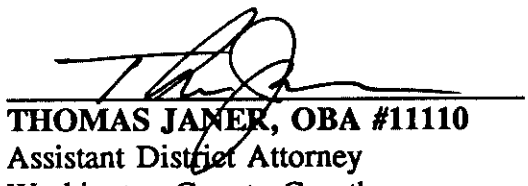
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



THOMAS JANER, OBA #11110
Assistant District Attorney
Washington County Courthouse
Fifth Street and Johnstone
Bartlesville, OK 74003
(918) 337-2860
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Washington County, Oklahoma

Judgment of Foreclosure
Case No. 96-CV-496-H (Dillon)

PP:cas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS WAITE and MARGARET WAITE,

Plaintiffs,

vs.

NEOAX, INC., a Delaware corporation, BROUGHAM SEATING, INC., AVM PRODUCTS, a Texas corporation, and BUCO, INC., a Texas corporation,

Defendants.

Case No. 95 C 263H

ORDER

The Court, having before it the written Joint Stipulation for Dismissal without Prejudice of all claims against Brougham Seating, Inc. presently pending herein, signed by all parties to this litigation with claims pending against Brougham Seating, Inc., finds that based upon the agreement of the parties the Joint Stipulation for Dismissal without Prejudice should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims against Brougham Seating, Inc. are hereby dismissed without prejudice.

Executed this 26th day of September, 1996.

JUDGE OF THE DISTRICT COURT

ENTERED ON DOCKET
DATE 9/30/96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 27 1996 SAR

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAY A. THOMPSON)
)
Plaintiff,)
)
v.) No. 96-C-39-J
)
SHIRLEY S. CHATER, Commissioner of)
Social Security Administration,)
)
Defendant.)

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered at the Commissioner's request. Plaintiff did not object to the Commissioner's request for remand. Therefore, judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 27th day of September 1996.

Sam A. Joyner
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THIRTEEN COLT, M-203, 40 MM GRENADE LAUNCHERS, THREE MACHINEGUNS, AND THREE FIREARMS SILENCERS

Defendants.

CIVIL ACTION NO. 91-C-861-C

ENTERED ON DOCKET
DATE SEP 27 1996

ORDER FOR DISBURSEMENT OF COST BOND

This matter coming on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma this _____ day of September, 1996, upon the Request for Disbursement of Cost Bond filed on September 19, 1996, and the Court, being fully advised in the premises, finds that costs of the United States Marshals Service, in the amount of $280.38, as itemized in the Request for Disbursement of Cost Bond, should be transferred into the Asset Forfeiture Fund as a recoverable expense, and that the United States Marshals Service should issue a check to Claimant William H. Fleming in the amount of $2,219.62.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the United States Marshals Service should transfer the sum of $280.38 from the Claim and Cost Bond posted by William H. Fleming in this matter to the Asset Forfeiture Fund, and should

issue a check to in the amount of $2,219.62 to William H. Fleming, representing the remainder of the Claim and Cost Bond.

(Signed) H. Dale Cook
H. DALE COOK, Senior Judge
United States District Court
Northern District of Oklahoma

Submitted by:

CATHERINE DEPEW HART OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 West Fourth Street
Tulsa, OK 74103

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JT 2-18-97
SC. 11-5-96

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN DOE and JANE DOE, husband and wife,	)	
	)	
plaintiffs,	)	
	)	
vs.	)	No.: 95-C 750H
	)	
THE AMERICAN RED CROSS, and	)	**JURY TRIAL DEMANDED**
GULF COAST REGIONAL BLOOD CENTER,	)	
	)	
defendants.	)	

ENTERED ON DOCKET
SEP 26 1996
DATE

STIPULATION OF DISMISSAL OF DEFENDANT AMERICAN RED CROSS

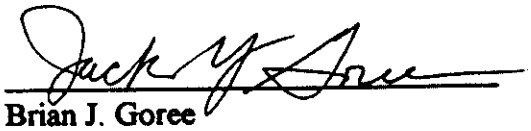
COMES NOW the plaintiffs, pursuant to 41(a)(1) of the Federal Rules of Civil Procedure, and hereby enters this stipulation of dismissal against Defendant American Red Cross only.

Respectfully submitted,

Renee Williams

Renee Williams
P.O. Box 52634
Tulsa, Oklahoma 74152
(918) 747-5000
Attorney for Plaintiff

Read and Approved:



Brian J. Goree
Jack Y. Goree
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7335 South Lewis, Suite 306
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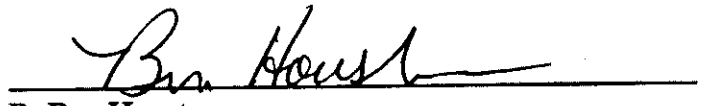
Attorneys for Defendant
Gulf Coast Regional Blood Center



R. Ben Houston
Hall, Estill, Hardwick, Gable, Golden & Nelson
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(918) 594-0400
Attorney for Defendant
American National Red Cross

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARINE MIDLAND BANK, Plaintiff, v. TULSA LITHO COMPANY, Defendant DWAYNE FLYNN, Defendant and Third-Party Plaintiff, and BANK OF OKLAHOMA, N.A., Defendant v. SUPERB PRINTING COMPANY and CONSOLIDATED GRAPHICS, INC., Third-Party Defendants.	)	Case No. 96-C-401K

SEP 2 3

F I L E

SEP 25

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

As the Plaintiff, Marine Midland Bank, has been granted summary judgment against the Defendant, Dwayne Flynn, the Court hereby ORDERS and ADJUDGES that the Plaintiff, Marine Midland Bank is entitled to judgment against Dwayne Flynn as set out in the Order of this Court granting the Plaintiff's Motion for Summary Judgment in the sum of $1,521,178.31 as of April 23, 1996, plus interest thereon at the rate of $1,000.23 per day until paid, plus costs incurred of $2,669.72, and that the Plaintiff is entitled to recover its reasonable attorneys' fees and costs of the action to be set by further Order of this Court.

Dated in Tulsa, Oklahoma, this 23 day of September, 1996.

s/ TERRY C. KERN

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARINE MIDLAND BANK, Plaintiff, v. TULSA LITHO COMPANY, Defendant DWAYNE FLYNN, Defendant and Third-Party Plaintiff, and BANK OF OKLAHOMA, N.A., Defendant v. SUPERB PRINTING COMPANY and CONSOLIDATED GRAPHICS, INC., Third-Party Defendants.	)	Case No. 96-C-401K

FILED

SEP 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SEP

ORDER

There comes before the Court the Plaintiff Marine Midland Bank's Motion for Summary Judgment against the Defendant, Dwayne Flynn, ("Flynn") on the guaranties by Flynn of the three notes executed by the Defendant, Tulsa Litho Company. After reviewing the Motion for Summary Judgment, the Brief in Support and hearing the stipulations of counsel, the Court FINDS that Marine Midland Bank is entitled to summary judgment against Flynn. The Court further finds that although other claims for relief were presented against Tulsa Litho Company (now a Chapter 11 debtor-in-possession) and third-party claims remain as between the Defendant, Dwayne Flynn, and the Third-Party Defendants, Consolidated Graphics, Inc. and Superb Printing Company, there is no just reason for delay and that judgment should be entered based upon this Order.

IT IS THEREFORE ORDERED that the Plaintiff, Marine Midland Bank, is entitled to summary judgment against the Defendant, Dwayne Flynn, on his guaranties of the notes of Tulsa Litho Company in the aggregate sum of $1,521,178.31 as of April 23, 1996, plus interest thereon at the rate of $1,000.23 per day thereafter until paid, costs incurred by the Plaintiff in the sum of $2,669.72 and reasonable attorneys' fees and court costs.

IT IS FURTHER ORDERED that although multiple parties remain pending, there is no just reason for delay and the Court hereby expressly directs the entry of a judgment pursuant to this Order.

s/ TERRY C. KERN

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Submitted by:

J Schaad Titus, OBA #9034
BOONE, SMITH, DAVIS, HURST & DICKMAN
500 ONEOK Plaza, 100 West Fifth St.
Tulsa, Oklahoma 74103

Attorney for The F&M Bank & Trust Company

APPROVED AS TO FORM:

Sidney K. Swinson, OBA #8804
ARRINGTON KIHLE GABERINO & DUNN
100 West Fifth Street, Suite 1000
Tulsa, Oklahoma 74103-4219

Attorney for Dwayne Flynn

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE PAUL MIHOS,

Plaintiff,

vs.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant.

No. 95-C-821-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 23 day of September, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY WAYNE SLAUGHTER,

Plaintiff,

vs.

NICOLE LITIF, probation and parole officer, GREG PROVINCE, supervisor, Tulsa probation and parole District 2, DELORES RAMSEY, misconduct reviewing authority,

Defendants.

Case No. 96-C-926-BU

JUDGMENT

This action came before the Court upon Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment. Having dismissed Plaintiff's claims against Defendants for restoration of earned credits and reinstatement of Preparole Conditional Supervision, Plaintiff's claims against Defendants under 42 U.S.C. § 1983 for alleged due process violations and Plaintiff's claims against Defendants, in their official capacities, under 42 U.S.C. § 1983 for sexual harassment and racial discrimination and having granted summary judgment in favor of Defendants, in their individual capacities, against Plaintiff on the claim under 42 U.S.C. § 1983 for sexual harassment and racial discrimination,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendants, Nicole Litif, Greg Province and Delores Ramsey, in their individual capacities, against Plaintiff, Terry Wayne Slaughter, on the claims under 42 U.S.C. § 1983 for

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sexual harassment and racial discrimination, with all other claims against Defendants being dismissed.

Dated at Tulsa, Oklahoma, this 25 day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Plaintiff,

vs.

MID-AMERICA PIPELINE COMPANY, MAPCO AMMONIA PIPELINE, INC., and FLINT ENGINEERING & CONSTRUCTION COMPANY,

Defendants.

Case No. 95-C-344-BU

ENTERED ON DOCKET

DATE SEP 26 1996

ADMINISTRATIVE CLOSING ORDER

Upon oral representation of Plaintiff's counsel that the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 25th day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

109

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LESLIE WAYNE REED,

Plaintiff,

vs.

PAT BALLARD, JACK JOHNSON, and MIKE SILVA,

Defendants.

No. 96-CV-732-BU

ORDER

On September 5, 1996, the Court granted Plaintiff's motion for leave to proceed in forma pauperis, informed Plaintiff that this action would be dismissed as frivolous unless he filed an amended complaint setting out his allegations with more specificity within fifteen days. 28 U.S.C. §§ 1915(e)(2)(B). Plaintiff has failed to comply with the above order.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE as frivolous.

IT IS SO ORDERED this 25th day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GALINO LOPEZ,

Plaintiff,

vs.

DOLORES RAMSEY, et al.,

Defendants.

No. 96-C-109-BU

ENTERED ON DOCKET
SEP 26 1996
DATE

ORDER

On February 28, 1996, the Clerk of Court notified Plaintiff that he failed to tender an *in forma pauperis* motion and summons and Marshal forms for service on the Defendants. Plaintiff has failed to comply with the above letter or seek an extension of time.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for lack of prosecution. The Clerk shall MAIL a copy of the complaint to Plaintiff.

SO ORDERED this 25th day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

LISA CRANDELL,

Plaintiff,

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION, a Delaware Corporation,

Defendant.

Case No. 96-C-191-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 25th day of September, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. BILLY E. BROOMHALL, JR., aka Bill Edward Broomhall, Jr., GINGER BROOMHALL, COUNTY TREASURER, Tulsa County, Oklahoma, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendant.	)	Case No. 96-C-352-BU ENTERED ON DOCKET DATE SEP 26 1996

ADMINISTRATIVE CLOSING ORDER

This matter came before the Court for status hearing on September 25, 1996. As the parties are attempting to settle this matter and believe this matter can be resolved, the Court, upon agreement of Plaintiff, **DIRECTS** the Clerk of the Court to administratively close this matter in his records.

If the parties have not reopened this matter by February 3, 1997, the plaintiff's action shall be deemed dismissed with prejudice.

Entered this 25th day of September, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KATHRYN HELTON,

Plaintiff,

vs.

FIRST IMAGE MANAGEMENT COMPANY, a Georgia Corporation,

Defendant.

Case No. 96-C-596-BU

ENTERED ON DOCKET

DATE SEP 26 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 25th day of September, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

8

ENTERED ON DOCKET
DATE 9/26/96

FILED

SEP 24 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY W. NOBLITT,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

Case No: 95-C-897-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 24, 1996.

Dated this 24th day of September, 1996.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY W. NOBLITT)
)
Plaintiff,)
)
v.)
) Case No. 95-C-897-W
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,[1])
)
Defendant.)

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for supplemental security income pursuant to §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Dana E. McDonald (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant suffers from severe degenerative disk disease and reactive airway disease secondary to smoking, and has a low average range of intellectual functioning. He concluded that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for more than the occasional lifting of up to 20 pounds, more than the frequent lifting or carrying of up to 10 pounds, the need to sit or stand every hour, and his inability to read and to write well. He concluded that the claimant was unable to perform his past relevant work as a tire shop worker, truck driver, ranch hand, roof laborer, landscaper, or fiber glass worker. He found that the claimant's residual functional capacity for the full range of light work was reduced by the need

---

[2] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

to sit or stand every hour and his inability to read and to write well. He concluded that the claimant was 36 years old, which is defined as a younger individual, had a ninth grade limited education, could not read and write well, and did not have any acquired work skills which were readily transferable to the skilled or semiskilled work activities of other work. He found that there were a significant number of jobs in the regional and national economies that claimant could perform, including auto car wash attendant, security guard, and parking lot attendant. Having determined that claimant could perform a significant number of jobs in the regional and national economies, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ did not give weight to the opinion of claimant's treating physician, and therefore incorrectly found that he did not meet or equal a listing in the Listing of Impairments.

(2) Because the objective clinical evidence supports the claimant's subjective complaints of pain, the ALJ's evaluation of credibility is in error.

(3) In the determination process, the ALJ ignored or discounted the claimant's non-exertional impairments.

(4) The ALJ did not proffer a proper hypothetical question to the vocational expert, as it did not include claimant's complaints of pain and mental restrictions.

(5) The determination is not supported by substantial evidence, because the ALJ selected only the evidence that would support his denial and did not consider the record as a whole.

It is well settled that the claimant bears the burden of proving his disability that

prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

In his application for supplemental income filed on January 3, 1994, claimant contended that he had been unable to work since July of 1990, because of back pain and inability to read and write. (TR 55, 108). The ALJ found that the application for benefits was for the period commencing on March 20, 1993, because an earlier application for benefits that claimant had filed had been denied on March 19, 1993, and claimant did not further appeal. (TR 16-17). Therefore, the ALJ concluded that there was no basis upon which to reopen the prior adjudication, and the earlier time period prior to March 20, 1993 was barred by the doctrine of res judicata. (TR 17).

Claimant injured his back while lifting tractor/trailer tires onto a rack at work in the summer of 1990. (TR 137). Dr. Harold L. Battenfield performed a left laminectomy at L5-S1 on November 29, 1990, and claimant tolerated the procedure well. (TR 171). He has not been engaged in substantial gainful activity since that time. (TR 162, 199). Claimant complains about continuous back pain, muscle spasms, numbness, and inability to sleep at night. (TR 139). He stated that at times his back hurts so badly that he has to have help just getting out of bed, and that any activity either aggravates or intensifies his pain. (TR 162). However, he admits that he cooks, drives, fishes, shops, and visits often with relatives and friends (TR 122-126, 159, 198).

Following his surgery in November of 1990, claimant was progressing well until he fell on ice on December 31, 1990, resulting in persistent pain (TR 132). Dr.

Harold L. Battenfield determined on February 22, 1991, that he had fifteen percent (15%) permanent impairment to his back. (TR 131). On May 21, 1991, claimant complained to Dr. Battenfield about progressive pain and discomfort. (TR 130). The doctor stated:

> He continues to complain of pain of a progressive nature, worse than when last seen. The patient moves about with considerable discomfort. Straight leg raising, positive, left and right, 30 degrees. Achilles reflex 1+, left and right. Toe extensor is 2-3+. Generalized tenderness to the lower lumbar spine, and veiled paravertebral muscles. AP x-rays revealed the AP to have deficient bone on one side of the vertebra secondary to the extensive laminectomy. Consideration is made for a lumbar fusion. (TR 130)

Claimant was examined by Dr. Robert Gibson in March of 1992. (TR 181-182). He told the doctor that he had constant pain in his back and down his left leg all the way to the toes, but was not taking any medication. (TR 181). He told the doctor that when he moved, by sitting, changing positions, standing, walking, coughing, or sneezing, he had pain. (TR 181). The doctor found that x-rays were non-revealing, but that claimant had pain on palpation and limited range in motion in his lumbar spine (TR 182). The doctor concluded:

> Based upon physical examination of the patient, the history and the medical records available to me, the patient has sustained an injury to his back as a result of his employment on July 29, 1990 while working for Ellsworth Motor Freight Line. Physical examination shows this patient to have an 18% impairment of the whole man due to range of motion limitations. He also has a 10% impairment due to a herniated disc with residuals including surgery. In addition to this, he has a 7% impairment of the left lower extremity due to function loss due to pain, discomfort, and sensory deficit and he has a 15% impairment of the left lower extremity due to function loss due to loss of strength. In respect to the back, the conversion of these impairments constitutes a 50% whole man net impairment. He was previously awarded a 5%

impairment, he therefore has a net of 45% impairment as a result of the above described injury. (TR 182).

Claimant reported to Dr. Jerry Patton on March 5, 1993 that he was having back pain, muscle spasm, numbness, and having trouble sleeping. (TR 139). He also admitted that he was not taking any medication or seeking any medical attention for his back. (TR 139). The doctor evaluated claimant and stated:

> Deep tendon reflexes are normal with the exception that there is a 0 reflex at the left patella and left Achilles where as the right patella and Achilles are +1. There is an absent extensor toe sign on the left as well. There appears to be no apparent anesthesia to the legs.
>
> It is my impression that the patient does have chronic lumbar unstable back pain following laminectomy for ruptured disk. The patient seems like he is somewhat malingering. The patient can only flex in lumbar flexion approximately 10 or 15 degrees with minimal extension. He can only do straight leg raising approximately 10 or 15 degrees. He states this is due to pain; however, the patient got on and off the examination table without much difficulty, also walks without difficulty. He has no limp. He walks in a safe manner without the use of an assistive device. There is no joint deformity, redness or swelling. There is tenderness to palpation in the lumbar area. He has good use of his hands and is able to do regular type movements with the use of his hands. It is my impression that the patient does have chronic pain of unknown intensity. (emphasis added).

(TR 139A).

Eleven months later, on February 13, 1994, claimant was involved in an altercation and received blunt trauma to his face and was kicked on the back and shoulder blade. (TR 149, 157). On March 3, 1994, he reported to his doctor that he had bent over to pick up trash and felt a severe pain in his lower back. (TR 157).

A consultative examination of claimant was performed by Dr. James S. Stauffer, D.O., on March 23, 1994. (TR 162-165). Claimant complained about a dull

pain that periodically became very sharp, radiating down his lower back and legs. (TR 162). He stated that any activity increased his pain and that he experienced progressive muscle weakness due to inactivity (TR 162). Dr. Stauffer stated:

> I do not see any paralysis. His gait is very poor. He walks very slowly. It is a broad based gait and appears relatively unstable. He does not walk with any type of cane or crutch today as far as assistive devices. Speed is very slow. Dexterity of fine and gross manipulation and grip strength are all okay except his grip strength is equal bilaterally. It is decreased but on talking with him, he thinks it is just because he does not do anything, not really a neurological problem. I do not see any joints that are deformed, red, swollen or have heat to them. He is tender in his low back to palpation. The significant thing on his physical examination is the lateral flexion is only 10 degrees bilaterally and anterior flexion is also 10 degrees, extension 0. His straight leg raising is positive at about 30 degrees with the knee extended, and with the knee flexed it is about 60 degrees bilaterally. His muscle strength appears to be weak bilaterally in his lower extremities and he appears to have poor effort but some tremor on testing of muscle strength in the lower legs bilaterally. (emphasis added).

(TR 163).

Claimant underwent a psychological evaluation on March 23, 1994 by Dr. William L. Cooper. (TR 159-161). Dr. Cooper found that claimant possessed normal speech and motor activity, fair reading skills, and very limited mathematics ability. (TR 159-160). Overall, claimant was found to have low average intellectual ability. (TR 160). The ALJ completed a psychiatric review technique form and concluded that claimant was mentally retarded and often experienced deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. (TR 25-27).

There is no merit to claimant's first alleged error that the ALJ did not give

proper weight to claimant's treating physician, Dr. Battenfield, and therefore incorrectly found that he did not meet or equal a listing in the Listing of Impairments. Claimant contends that Dr. Stauffer and Dr. Patton reported symptoms showing that he has a condition that met or equaled Section 1.05C of the Listing of Impairments.

For a claimant to show that his impairment matches a listing, it must meet all of the specified medical criteria. Sullivan v. Zebley, 493 U.S. 521, 530 (1990). "An impairment that manifests only some of those criteria, no matter how severely, does not qualify." Id. Section 1.05C of 20 C.F.R. 404.1599 Subpt. P, App. 1, entitled "Disorders of the Spine: Other Vertebrogenic Disorders," requires a condition that is expected to last twelve months and includes the following diagnosed symptoms: pain, muscle spasm, and significant loss of motion in the spine along with significant motor loss with muscle weakness, and sensory and reflex loss.

Dr. Stauffer's evaluation of claimant found limited range of motion in his back and muscle weakness due to inactivity, but no evidence of diagnosed muscle spasms or sensory or reflex loss. (TR 163). The only evidence of muscle spasms in the record are claimant's subjective complaints (TR 139, 162). Subjective complaints alone are not enough to prove disability. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). Dr. Battenfield concluded that claimant had a fifteen percent impairment to his back and a lumber fusion could be considered, but did not say claimant met the Listings. (TR 131). The ALJ's finding that claimant did not have a listed or equivalent impairment is supported by substantial evidence, including Dr. Stauffer's comments that claimant did not use any assistive devices,

gave poor effort, and had decreased grip strength due to inactivity. (TR 18, 163).

Plaintiff's next alleged error, that the ALJ's evaluation of claimant's credibility was erroneous, likewise is without merit. Claimant argues that the ALJ only considered objective evidence and discounted claimant's subjective complaints. The ALJ has a duty to offer specific reasons why he found claimant not credible, rather than mere conclusions. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995). The ALJ correctly noted that claimant's allegations of pain must be analyzed in accordance with the guidelines set out in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987) (TR 20).

The court in Luna discussed what must be shown to prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling.

Id. (emphasis added) (citations omitted). See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

In the case at bar, the ALJ considered many of the factors cited in Luna. The ALJ noted that claimant did not use a cane or other assistive device during doctors' examinations and gave poor effort during the exams. (TR 19). Claimant had also discontinued use of prescription medication and was not seeking further medical attention to help relieve his pain. (TR 20). Claimant argued that he could not afford further treatment or expensive prescription medication (TR 201-202). However, the ALJ noted that, if claimant's pain were as severe and disabling as alleged, he would do everything in his power to obtain relief at public medical facilities available for those unable to pay for care. (TR 20). He noted that the record showed claimant had enough money to smoke forty cigarettes a day. (TR 20, 163). The ALJ noted that claimant testified that he could lift 30-40 pounds and occasionally took a half can of feed to a friend's horse which weighed approximately twenty pounds, as required by light work. (TR 21, 204).

Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). Looking at the entire record, the ALJ considered all of claimant's complaints and actions. The ALJ's determination that claimant was not credible was supported by substantial evidence and the ALJ gave specific reasons for his conclusion.

There is no merit to claimant's third contention that the ALJ failed to consider his non-exceptional impairments, including pain, loss of concentration, and a need to alternate sitting and standing. The ALJ discussed these complaints in detail (TR 18-24). Claimant argues that a person cannot perform light work while being required to alternate sit/stand, and he cites an unpublished Kansas District Court case as his authority. However, the Tenth Circuit ruled in Kelley v. Chater, 62 F.3d 335, 338 (10th Cir. 1995), that Social Security Ruling 83-12 does not mandate a finding of disability if there is a need to alternate sitting and standing, but requires that the ALJ call a vocational expert to testify about the implications for the occupational base. In the case at bar, the ALJ heard testimony from a vocational expert, A. Glen Marlowe, who found three different occupations that claimant could perform based on a hypothetical question including the need to alternate positions. (TR 227). [4]

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[4]The ALJ asked the following question:

Q Now, I want you to assume, please, if you would that we have an individual who is of the same age, education, and work experience as the claimant in this case, but who has been tested and has a low average range of intellectual ability and is unable to read and write and has a limited ability to work with numbers, in particular to make change and so forth. I want you to further assume that the hypothetical claimant due to a back injury has a limited range of motion in the back, but that despite that he is able to perform a full range of light-level work provided he is given a sit/stand option at the job. I want you to further assume that the claimant exhibits symptomatology which includes pain from a variety of sources, but primarily from the back and the back injury, which varies in intensity from mild to moderate to occasionally chronic, that is of sufficient severity to be noticeable to him at all times, but which would not prevent him from being attendant to his job, being responsive to supervision, or being cooperative with coworkers so that he could carry out routine work responsibilities in a satisfactory manner. Given a hypothetical claimant with the limitations I've described, are you able to identify other work at an unskilled level that this individual could perform?

A Well, would you clarify the sit/stand option, Your Honor? Does that mean at will or are you giving me a time in there or --

Q Let's do it both ways. Let's assume that it is at the will of the employer, but the claimant would need the option of being able to sit or stand alternately roughly at half hour intervals. That is, he would need at roughly a half an hour time to be able to get up and down. (TR 226-227).

Claimant also argues that three jobs are insufficient for the Commissioner to meet his burden of showing that a significant number of jobs exist in the national economy that claimant can perform. This argument is without merit. The court has never established a bright line standard measuring what constitutes a significant number of jobs. Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992). That decision has always been left up to the common sense of the ALJ. Id.

There is no merit to claimant's contention that the ALJ did not proffer a proper hypothetical question to the vocational expert. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Claimant argues that the ALJ was required to quantify his pain in the hypothetical question. The ALJ's hypothetical labeled the pain as "mild to moderate to occasionally chronic . . . ." (TR 226). Since the question contained a range of intensity for claimant's pain, it was proper in this respect.

Claimant also argues that the ALJ erred in failing to mention claimant's deficiencies of concentration in his hypothetical. While the ALJ concluded that claimant would "[o]ften experience deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or

elsewhere)" because of his mental retardation, he also concluded that claimant was not dependent on others, could follow directions, suffered only slight restrictions of activities of daily living, and only had slight difficulties maintaining social functioning. (TR 25-26). The vocational expert included in his hypothetical that claimant had a low average range of intellectual ability and could not read and write (TR 226). This was sufficient to establish that claimant had mental limitations which the vocational expert must consider. The expert was still able to find three occupations containing 1500 jobs that claimant could perform, notwithstanding his mental and physical problems.

Claimant's final argument is that the ALJ selected only evidence favorable to his opinion and disregarded the record as a whole is also without merit. There is substantial evidence in the record as a whole to support the decision.

The decision of the ALJ is affirmed.

Dated this 24th day of September, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:noblitt.ss1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

MAKER, HARRY LESLIE and PATRICIA LOUISE,

Debtor,

HARRY L. MAKER and PATRICIA L. MAKER,

Appellants,

vs.

JIM and WILMA BELDEN,

Appellees.

Case No. 96-C-001-H

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. The appeal has been fully briefed. Also before the Court is the Motion to Dismiss of Appellees. [Dkt. 2].

The Debtors ("Makers") appeal from the orders of the Bankruptcy Court, Stephen J. Covey, J., finding that a particular installment note was intended to be a mortgage on Debtor's homestead and lifting the stay imposed by 11 U.S.C. § 362(a) to enable Appellees ("Beldens") to pursue their state court foreclosure proceeding on the real property belonging to Debtors. Appellees seek dismissal of one of the issues raised in this appeal because the Bankruptcy Court has not ruled on that issue. For the reasons hereafter discussed, the undersigned United States Magistrate Judge

RECOMMENDS that the decision of the Bankruptcy Court be AFFIRMED and the Motion to Dismiss be GRANTED.

JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White* (*In re White*), 25 F.3rd 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988).

PROCEDURAL HISTORY AND FACTS

On August 14, 1991, the Debtors ("Makers") purchased a 1977 Kings Highway Motor Home from the Appellees ("Beldens"). To finance this purchase, the Makers executed an instrument entitled Installment Note in the principal sum of $17,500.00 with interest accruing at the rate of 10% per annum. The note provided for monthly payments of $182.70 per month and contained the following recitation concerning security:

> This note is secured by 1977 Kings Highway Motor Home, M50CABJ023853, and all real estate and personal property owned by Harry L. Maker and Patricia L. Maker, 1228 South Elgin, Tulsa, Ok; a custom caddy with value of $1,250.00. The 400 acres west of Hominy is excluded.

[Dkt. 6, Exhibit 1].

On May 31, 1994, the Makers voluntarily surrendered the motor home to the Beldens. The Beldens filed an action in Tulsa County District Court, Case No. CJ-94-

4927, seeking recovery of the deficiency on the installment note and foreclosure of mortgage on real property described as: 1228 South Elgin, Tulsa, Oklahoma.

On April 14, 1995 the Makers filed a Bankruptcy Petition under Chapter 7 of the Bankruptcy Code. The Makers listed the real estate at 1228 South Elgin as exempt from the bankruptcy estate. The Beldens filed a motion with the Bankruptcy Court seeking relief from the automatic stay imposed by 11 U.S. C. § 362(a) to enable them to proceed with their mortgage foreclosure proceeding in Tulsa County District Court. Over the objection of the Makers and after conducting an evidentiary hearing, the Bankruptcy Court found that the parties intended that the Installment Note operate as a mortgage on the Makers' property located at 1228 South Elgin and entered an order lifting the stay.

On appeal the Makers challenge the orders of the Bankruptcy Court and raise the following issues: (1) whether, under Oklahoma law, the recitation of security in the subject installment note is a valid mortgage; (2) whether the property at 1228 South Elgin has been properly exempted from the bankruptcy estate in favor of the debtors; and whether the lien should be avoided under 11 U.S.C. § 541 or other applicable law.[1]

[1] Issue (2) is the subject of the motion to dismiss [Dkt. 2].

MOTION TO DISMISS

In their motion to dismiss [Dkt. 2] the Beldens assert that Issue No. 2 on the Statement of the Issues on Appeal is subject to dismissal for the reason that the Bankruptcy Court has not ruled on the matters raised therein.

Issue No. 2 in the Statement of the Issues on Appeal filed November 29, 1995 with the Bankruptcy Court states in relevant part:

> [W]hether or not the homestead of the Debtors is and has been properly exempted from the Bankruptcy estate in favor of the Debtors and whether or not the lien should be avoided under 11 U.S.C. Section 541 or any other applicable law.

There is nothing in the record to suggest that these issues are the subject of a "final judgment, order, or decree of a bankruptcy judge" Bankr. Rule 8001(a), or were otherwise ruled upon by the Bankruptcy Court. At the close of the hearing, the Bankruptcy Court specifically limited his ruling, stating that the only thing he was ruling on was the document [installment note] and the intent of the parties. [Trans. p. 61, ln. 21-22]. There is, therefore, no decision from which to launch an appeal raising Issue No. 2. Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that the Belden's Motion to Dismiss Issue No. 2 [Dkt. 2] be GRANTED.

ANALYSIS

The Makers argue that the Bankruptcy Court erred in finding that the installment note listing their real estate located at 1228 South Elgin constitutes a mortgage under Oklahoma law. Specifically they argue that, in accordance with 46

Okla. Stat. § 3, a mortgage must contain words of grant, such as: "have mortgaged and hereby mortgage." 46 Okla. Stat. § 3 is entitled "Form of mortgage" and provides, in relevant part: "A mortgage upon real estate may be substantially in the following form, to wit: . . . ." [emphasis supplied]. Use of the word may in the statute suggests that use of the statutory language is not mandatory. Indeed, in 1918 the Oklahoma Supreme Court affirmed the principle that a mortgage on realty is not required to be in any particular form. *Harn v. Missouri State Life Ins. Co.,* 173 P. 214, 216 (Okla. 1918). When an instrument is intended by the parties to be a mortgage and is given as security for the repayment of a debt, under Oklahoma law, the instrument is deemed to be a mortgage. *Id.* The finding by the Bankruptcy Court that "Oklahoma law has no requirement for particular words of grant to create a mortgage on real property" is a correct one.

On appeal the Makers maintain that they had no intention to mortgage their property at 1228 South Elgin. They assert that the reference to the address within the note was merely a means of identifying them. At the evidentiary hearing before the Bankruptcy Court, Mr. Maker testified that he signed the installment loan note, but he did not remember that it referred to real estate. [Trans. p. 48] However, he also testified that it was his idea to place the language in the note that "400 acres west of Hominy is excluded." [Trans. p. 51]. Relying on the specific exclusion of the Hominy property, the Bankruptcy Court found that there was an intellect at work in the transaction and that the parties intended to mortgage the 1228 South Elgin

property. [Trans. p. 58]. This factual finding is supported by the record and is not clearly erroneous.

The Makers also claim that the instrument was not subscribed as required by 16 Okla. Stat. § 4. The second and final page of the instrument bears the notarized signatures of both Harry L. Maker and Patricia L. Maker. Mr. Maker testified to having signed the instrument. [Trans. p. 48]. Mrs. Maker, although present in the courtroom, refused to testify. There was no evidence presented to suggest that the instrument was not signed by Mrs. Maker. The finding that the Makers executed the note is supported by the record and is not clearly erroneous.

The Court finds that the Bankruptcy Court's holding that the installment note on the Maker's real estate located at 1228 South Elgin is a valid mortgage should be AFFIRMED.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS: (1) that the Belden's Motion to Dismiss Issue No. 2 [Dkt. 2] be GRANTED; and (2) that the September 20, 1995 Order of the Bankruptcy Court that the Installment Note dated August 14, 1991 is a valid mortgage on Debtor's real estate located at 1228 South Elgin in favor of Jim and Wilma Belden be AFFIRMED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of service of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based

upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Dated this 24th day of September 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GINA THOMISON,

Plaintiff,

vs.

CITY OF BARTLESVILLE, ex rel. BARTLESVILLE POLICE DEPARTMENT; ROBERT METZINGER, individually and in his official capacity as City Manager; STEVE BROWN, individually and in his official capacity as Police Chief; JOE SLACK, individually and in official capacity as an Officer,

Defendants.

Case No. 95-C-836-B

ORDER

The Court has for consideration Defendants' City of Bartlesville, *ex rel.* Bartlesville Police Department, Robert Metzinger ("Metzinger"), Steve Brown ("Brown") and Joe Slack ("Slack") (collectively known as "Defendants") Motion for Summary Judgment pursuant to Fed.R.Civ.P 56. After a careful review of the record and applicable legal authorities, the Court hereby GRANTS in part and DENIES in part Defendants' Motion for Summary Judgment as set forth herein.

I. Uncontroverted Facts

1. The City of Bartlesville ("City") is a political subdivision of the State of Oklahoma. The City has a Council-Manager form of government. (Defendants' Brief, Ex. A).

2. Robert E. Metzinger ("Metzinger") has been employed as the City Manager of the City from October 19, 1987 to the present. (Defendants' Brief, Ex. B).

3. Thomas Holland ("Holland") was employed as the Chief of Police of the City during

the period February 12, 1990 through June 30, 1993. (Defendants' Brief, Ex. B).

4. Steven L. Brown ("Brown") has been employed as the Chief of Police of the City from November 8, 1993 to the present. (Defendants' Brief, Ex. B).

5. Joe Slack ("Slack") has been employed as a Bartlesville police officer from June 18, 1979 to the present. (Defendants' Brief, Ex. B).

6. Gina E. Thomison ("Plaintiff") was employed as a dispatcher, as an employee at will, for the Bartlesville Police Department during the period January 23, 1989 through August 29, 1994. (Defendants' Brief, Ex. B).

7. Gary Dawson ("Dawson") was employed as a Bartlesville police officer during the period February 13, 1978 through August 29, 1994. (Defendants' Brief, Ex. B).

8. On July 16, 1992 Plaintiff made an internal complaint of sexual harassment against Sergeant David Embry. (Defendants' Brief, Ex. C). That complaint was investigated and Embry was disciplined. (Defendants' Brief, Ex. D at p. 45, l. 24 to p. 46, l. 8.]

9. During the course of the Police Department internal affairs investigation of Plaintiff's sexual harassment complaint against Embry, Police Officer Michael Woods complained of inappropriate behavior of Plaintiff in the form of vulgar language and wearing a "School's Open" bumper sticker on her backside. (Defendants' Brief, Ex. C). Plaintiff received a written reprimand for that incident. (Defendants' Brief, Ex. E).

10. On November 16, 1992, a Grand Jury was impaneled to investigate the operation of the Washington County District Attorney's office, the Bartlesville Police Department, and the Bartlesville City government. (Defendants' Brief, Ex. F). The Final Report of the Grand Jury, dated January 13, 1993, expressed displeasure and concern over unspecified damaging rumors and gossip

among the ranks of Police personnel. (*Id.*).

11. Dawson testified before the Grand Jury. (Defendants' Brief, Ex. G at p. 29, 1. 12-14). Plaintiff claims she passed along things she heard to Dawson for his use in his testimony. (*Id.* at p. 27, 1. 18 to p. 29, 1. 11).

12. Police Chief Holland resigned effective June 30, 1993. (Defendants' Brief, Ex. B). He was succeeded by Police Chief Brown. (*Id.*)

13. In connection with the City Budget for the 1993-94 fiscal year, City Manager Metzinger proposed to eliminate the job of one Police Department dispatcher position. (Defendants' Brief, Ex. D at p. 31 1. 13-17). Plaintiff believed her job would be the job eliminated. (Defendants' Brief, Ex. G at p. 38, 1. 1-4).

14. Plaintiff, along with several other Police Department employees, opposed the reduction in staff at City Council meetings, in the press, and in letters written to the City Manager. (Defendants' Brief, Ex. G at p. 37, 1. 21 to p. 38, 1. 4). Plaintiff opposed the reduction in staff because she believed her job would be eliminated. (*Id.* at p. 38, 1. 3-4).

15. On or about July 8, 1994, Officer Slack reported he had witnessed Plaintiff and Dawson engaged in sexual intercourse in a Lieutenant's office. (Defendants' Brief, Ex. 4 at p. BV 1531). Slack believed the incident occurred about two years prior to his reporting. (Plaintiff's Brief, Ex. 17 at pp. 14-15). Upon learning of the allegation, Chief Brown suspended Plaintiff and Dawson, with pay, and ordered an internal affairs investigation. (Defendants' Brief, Ex. C).

16. During the internal affairs investigation, Plaintiff was specifically advised of the allegations against her, and the source of those allegations. (Defendants' Brief, Ex. I).

17. On August 3, 1994, Officer Slack submitted to a polygraph examination. Defendants'

Brief, Ex. J). His test results were consistent with those of a person telling the truth. (*Id.*).

18. On August 16, 1994, Plaintiff and Dawson submitted to polygraph examinations. (Defendants' Brief, Ex. C). Dawson's test results were not consistent with those of a truthful person. (Defendants' Brief, Ex. 2 at p. BV 844). Plaintiff's test results were reported as inconclusive. (Defendants' Brief, Ex. 3).

19. On August 23, 1994, Chief Brown conducted a predisciplinary hearing in connection with the allegations against Plaintiff. (Defendants' Brief, Ex. 4). At that time, Plaintiff was given an opportunity to respond to the charges against her. (*Id.*). Plaintiff was represented by her attorney at the hearing. (*Id.*).

20. On August 29, 1994 Chief Brown advised Plaintiff that she was to be terminated as a result of his investigation of the allegations against her, but allowed her the opportunity to resign. (Defendants' Brief, Ex. C). Plaintiff requested that she be allowed to contact her attorney prior to making her decision. (*Id.*). Chief Brown denied that request. (*Id.*). Plaintiff declined to resign. (*Id.*).

21. Prior to Plaintiff's termination, she was advised of her right to file a grievance, and the procedure to be followed. (Defendants' Brief, Ex. B).

22. Plaintiff requested a grievance hearing. (*Id.*). On September 26, 1994, a grievance committee met to hear evidence. (*Id.*). At that time Plaintiff, who was represented by counsel, called witnesses and cross-examined adverse witnesses. (Defendants' Brief, Ex. G at p. 69, l. 13 to p. 70, l. 2., Defendants' Brief, Ex. M).

23. The Grievance Committee found that the City's action was inappropriate. (Defendants' Brief, Ex. K).

24. Chief Brown appealed the decision of the Grievance Committee. (*Id.*). City Manager Metzinger declined to follow the decision of the Grievance Committee and affirmed the termination of Plaintiff. (*Id.*).

25. Pursuant to the City Charter, only the City Manager has the authority to terminate City employees. (Defendants' Brief, Ex. A). City employees may be terminated for the good of the service. (*Id.*).

II. The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620

F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

III. Legal Analysis

A. First Amendment Retaliation

Plaintiff alleges she was retaliated against for three incidents of speech in violation of the First Amendment. In the first instance, Plaintiff learned a proposed City Budget might eliminate one dispatcher position. Speculating the position to be eliminated may have been her's, Plaintiff attended and spoke out at City Council meetings. (Plaintiff's Brief, Ex. 1, p. 38). For speech to be protected by the First Amendment, it must meet certain criteria. Initially, the speech must be of public concern. Connick v. Myers, 461 U.S. 138, 143 (1983). Plaintiff insists a police dispatcher is a public employee, thereby making a proposed reduction in dispatcher positions a public concern. However, Plaintiff admits her reason for speaking out against the budget was to protect her job. Such an

admission is fatal to Plaintiff's claim.

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147.

Supported by Plaintiff's admission, the Court is of the opinion Plaintiff's speech concerned matters personal to her. The Court does not find any unusual circumstances warranting a departure from the settled law of Connick v. Myers, *supra*. Plaintiff's claim she was retaliated against by Defendants for speaking out against the proposed dispatcher job elimination fails as a matter of law.

The second incident of speech in which Plaintiff claims her First Amendment rights were violated relates to her assisting Dawson with his testimony before the Washington County Grand Jury in 1992. Plaintiff claims responsibility for supplying Dawson with information to which he testified before the Grand Jury. Plaintiff admits she does not know what Dawson's testimony consisted of, or if he passed on the information supplied by Plaintiff. Plaintiff offers no evidence any of her superiors knew of her self-proclaimed "involvement" in the grand jury proceeding. Accordingly, this claim lacks merit.

The last incident of speech for which Plaintiff claims she was retaliated against involves Plaintiff's complaint of sexual harassment against Sergeant Embry. In Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987), a school district employee alleged sexual harassment by a supervisor and claimed she was retaliated against for so doing. The Court held Plaintiff's claim was a private concern, although the claim touched on matter of public concern generally. The plaintiff in Callaway purposely intended her complaints of sexual harassment to be handled as a confidential personal internal matter.

Thus, the plaintiff's First Amendment rights were not implicated. In the case at bar, Plaintiff shows no evidence her reporting sexual harassment by Sergeant Embry to her superiors was anything but an internal matter. Thus, Plaintiff's reporting of the alleged sexual harassment by Sergeant Embry is not protected by the First Amendment and this claim fails as a matter of law.

Defendants' Motion for Summary Judgment as to Plaintiff's three claims of First Amendment retaliation is hereby GRANTED.

B. Due Process Violations

In her deposition and Amended Complaint, Plaintiff claims she was denied procedural due process on multiple instances during her termination proceedings. In arguing her due process rights were violated, Plaintiff first seeks to convince the Court she had a property right or interest in continued employment and such right was violated. An employee must be able to demonstrate she had a property right or interest in continued employment before being entitled to due process in connection with employment decisions. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Such property rights are created, defined and governed by the law of the state in which the employee is employed. Id. Plaintiff admits she is a terminable at will employee. (Plaintiff's Brief, pg. 24). As an at will employee, Oklahoma law and/or the City Charter of Bartlesville does not afford Plaintiff property rights or interests in continued employment. *See* Hall v. O'Keefe, 617 P.2d 196 (Okla. 1980); Lee v. Norick, 447 P.2d 1015 (Okla. 1968); Graham v. City of Oklahoma City, 859 F.2d 142 (10th Cir. 1988). Without a property right or interest in continued employment, that portion of Plaintiff's claim fails as a matter of law.

Plaintiff also argues she had a liberty interest in her good name and reputation and Defendants

infringed upon such interest by not affording her due process. To make a claim of deprivation of a liberty interest Plaintiff must show (1) a defamatory or stigmatizing statement was made in the course of employment termination; (2) the statement was published; and (3) the statement was false. Melton v. City of Oklahoma City, 928 F.2d 920, 927 (10th Cir. 1991).

In citing Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), Plaintiff recognizes she must be able to show stigmatizing information about her was published to be entitled to due process with respect to any liberty interests. The Court is of the opinion an allegation of having sexual intercourse on a desk within Police headquarters could have a stigmatizing effect on those involved. However, Plaintiff's generalized allegations that "prolific, sexually oriented rumor-mongering of the Defendant's (sic) caused Slack's slander to be published to employees that had no need to know and then published to the public" is not the kind of "evidence" Plaintiff can use to show a publication of stigmatizing information was made. (Plaintiff's Brief, p. 16). Plaintiff provides no admissible evidence the City, through its agents or employees acting within the scope of their employment, published the basis for Plaintiff's termination.

Plaintiff attempts to equate matters discussed among members of the Bartlesville Police Department during the internal investigation to a publication of stigmatizing information about her. The Court declines to make such an equation. To do so would not only inhibit any future internal investigation for fear of violating one's liberty interests, but also conflict with the basic premise of Magnolia Petroleum Co. v. Davidson, 148 P.2d 468 (Okla. 1944) (holding intracompany communications do not give rise to defamation claims as there is no publication when an employer communicates with its agents or employees).

Assuming, *arguendo*, Plaintiff's liberty interests were implicated by publication of a false,

stigmatizing statement which impairs her future employment opportunities, the Court is of the opinion Plaintiff was afforded all the process due her. Essentially, due process requires notice and an opportunity to be heard. Cleveland Board of Education v. Loudermill, *supra.* "The essential requirements of due process . . . are notice and an opportunity to respond. . . . To require more than this prior to termination would intrude an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. *Id.* at 546. The following chronology clearly shows Plaintiff was afforded due process. In fact, Plaintiff received such adequate process she actually convinced the Grievance Committee her termination was inappropriate.

Plaintiff was contacted by Robert Newman, head of the internal investigation, and informed of the allegation against her. Plaintiff was provided an opportunity to give her side of the story at this initial stage of the investigation. Plaintiff was next noticed of and afforded a pre-disciplinary hearing. Plaintiff was orally informed of the allegations against her and, with her attorney present, given an opportunity to respond. Plaintiff and her attorney took full advantage of this opportunity. (*See* Defendants' Brief, Ex. 4). During the pre-disciplinary hearing, Plaintiff was given the option to waive or preserve her right to appeal any adverse decision of Brown. She chose to preserve her right to appeal.

Some six (6) days after the pre-disciplinary hearing, Brown gave Plaintiff the opportunity to resign from her job instead of being terminated. Plaintiff's request to confer with counsel before making her decision was denied by Brown. Plaintiff declined to resign and was terminated. Plaintiff chose to appeal Brown's decision. Approximately four (4) weeks later, Plaintiff was afforded a hearing before a Grievance Committee. Plaintiff was present at the hearing and represented by counsel. Plaintiff was given the opportunity, through counsel, to call witnesses and cross examine

adverse witnesses. In keeping within their scope of authority, the Grievance Committee found Plaintiff's termination was not deserved and inappropriate. Brown appealed this finding to City Manager Metzinger, the final authority.

After postponing a decision until the entire record was before him, Metzinger sustained Brown's appeal and affirmed the earlier termination of Plaintiff. Metzinger afforded Plaintiff seven (7) days to provide additional information which could influence his decision. (Defendants' Brief, Ex. K). The record does not reveal Plaintiff offered additional evidence to supplement the record. The Court is of the opinion Plaintiff was afforded due process, whether she was entitled to it or not. Cleveland Board of Education v. Loudermill, *supra*; Workman v. Jordan, 32 F.3d 475 (10th Cir. 1994); West v. Grand County, 967 F.2d 362 (10th Cir. 1992); Rosewitz v. Latting, 689 F.2d 175 (10th Cir. 1982). Accordingly, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Plaintiff's claim of due process and/or liberty interest violations.

C. Invasion of Privacy[1]

Plaintiff claims certain questions asked by Robert Newman during the internal investigation of Slack's allegation concerning any off duty sexual activity with Dawson invaded her right to privacy. The Court disagrees. Newman asked if Plaintiff had ever had a sexual relationship with Dawson at any time. Plaintiff responded in the positive. Newman continued to inquire as to when Plaintiff had engaged in sexual activities with Dawson. Plaintiff admitted two occasions of sexual activity with Dawson had occurred about three and a half years previous. Newman then asked for the

[1]Despite being a resident of the State of Kansas, Plaintiff's pendent state claims are governed by Oklahoma law. Bohannan v. Allstate Insurance Co., 820 P.2d 787 (Okla. 1991).

circumstances of how the sexual activity occurred and where it took place. Plaintiff's response did include a statement the extramarital (Plaintiff's Brief, Ex. 1, p. 119, l. 14-16) sexual activity occurred while she was off duty. The further questioning by Newman simply sought to elicit the locations of the sexual encounters so as to include or preclude Police headquarters as a site. Once this was done, Newman did not delve further into the details of the relationship. (Defendant's Brief, Ex. 2, Thomison Interview by Newman). Further, such intimacy between employees could have relevance regarding continued operation of the Police Department.

The Court believes it was proper for Newman to satisfy the question of whether Plaintiff engaged in sex with Dawson at Police headquarters while on or off duty and the nature of their relationship. Warren v. City of Asheville, 328 S.E.2d 859 (N.C. App. 1985). Obviously, Plaintiff's privacy was integral to the investigation of the alleged sex in the Lieutenant's office. The Court hereby GRANTS Defendant's Motion for Summary Judgment as to Plaintiff's claim of invasion of privacy.

D. Wrongful Termination

Plaintiff claims she has been retaliated against for having exercised her First Amendment rights, i.e. filing a sexual harassment claim against Sergeant Embry, in violation of Oklahoma public policy. Plaintiff, an at-will employee, recognizes her claim of wrongful termination based on Oklahoma common law is barred by List v. Anchor Paint Mfg. Co., 910 P.2d 1011 (Okla. 1996), as Title VII provides a remedy for a claim of status-based (sex) harassment or retaliatory discharge. (Plaintiff's Brief, pg. 20).

E. Defamation

In her deposition, Plaintiff testifies it is her belief Slack, Brown and Metzinger have defamed her. Plaintiff claims Slack's allegation of her having sexual intercourse with Dawson on a Police Department desk was defamatory. Plaintiff claims Brown defamed her by alleging to Chief Pell, Caney, Kansas Police Department, that Plaintiff was illegally collecting unemployment benefits, and by the appeal letter Brown wrote to Metzinger. (Plaintiff's Brief, Ex. 24). Finally, Plaintiff claims Metzinger defamed her but she doesn't know how. (Plaintiff's Brief, Ex. 1, pg. 84, l. 18-21).

Under Oklahoma law, defamation is a false and unprivileged publication which tends to injure an individual in respect to her profession, or imputes want of chastity. Okla.Stat. tit. 12 § 1442. The Court finds no evidentiary support for Plaintiff's defamation claim against Brown and no legal and/or evidentiary basis for Plaintiff's defamation claim against Metzinger. Any objectionable statements made by Brown or Metzinger were internal department communications, and not defamatory as a matter of law. Magnolia Petroleum Co. v. Davidson, 148 P.2d 468 (Okla. 1944).

Plaintiff claims the initial allegation of her and Dawson's tryst, made by Slack to Theresa Hampton in April 1994, was an effort by Slack to sexually seduce Hampton. Plaintiff then claims Slack was forced to divulge the false information when Hampton demanded he report the incident to the supervisor. (Plaintiff's Amended Complaint, ¶ 16). Plaintiff fails to cite where this assertion is supported in the record. Actually, a reading of Hampton's testimony to the Grievance Committee paints a much different picture. (Plaintiff's Brief, Ex. 13). The Court is of the opinion Slack's revelation of the subject incident to Hampton was an intracompany communication, and therefore, not a publication. Magnolia Petroleum Co. v. Davidson, *supra.*

Assuming a question of fact did exist as to whether the April 1994 allegation by Slack to

Hampton constituted a publication exposing him to liability for defamation, the one year statute of limitations bars Plaintiff's claim as the instant action was filed in August 1995. Okla.Stat. tit 12 § 95.4.

Plaintiff's self-publication theory need not be passed on by the Court. Oklahoma has not adopted the self-publication doctrine and even if Oklahoma had, Plaintiff provides no evidence she has been compelled to self-publish the alleged incident. Further, Plaintiff's claim she may be forced to self-publish the allegation is prospective speculation at best. Accordingly, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Plaintiff's claim of defamation.

F. Intentional Infliction of Emotional Distress

The Oklahoma Supreme Court, in Eddy v. Brown, 715 P.2d 74, 76 (Okla. 1986), recognized the independent tort of intentional infliction of emotional distress. The Eddy court held that in determining whether an action for this tort exists, the narrow standard of Restatement (Second) of Torts § 46 should be applied. Id. Section 46 provides, in relevant part:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts, § 46 (1977).

According to Eddy, "[i]t is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards." Id. "Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability." Breeden v. League Services, 575

P.2d 1374, 1377 (Okla. 1978).

In determining whether conduct is "sufficiently extreme and outrageous" to give rise to a claim of intentional infliction of emotional distress, the Oklahoma Supreme Court held that "[c]onduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be 'regarded as utterly intolerable in a civilized community,' falls short of having actionable quality." Eddy v. Brown, 715 P.2d at 77; *see also* Restatement (Second) of Torts, § 46 cmt. d (1977). In the recent decision of Starr v. Pearle Vision, Inc., 54 F.3d 1548 (10th Cir. 1995), the Tenth Circuit Court of Appeals, in applying Oklahoma law, held that "[n]othing short of 'extraordinary transgressions of the bounds of civility' will give rise to liability for intentional infliction of emotional distress." Id. at 1558 (*quoting* Merrick v. Northern Natural Gas Co., 911 F.2d 426, 432 (10th Cir. 1990)). In determining whether a jury could reasonably conclude that particular conduct was indeed "extreme" or "outrageous," this Court must focus "on the totality of the circumstances, including the nature of the conduct and the setting in which it occurred." Starr v. Pearle Vision, 54 F.3d at 1559.

Plaintiff contends Slack and Brown have intentionally inflicted emotional distress upon her by Slack reporting to have seen her and Dawson engaged in sexual intercourse on a desk in the Police Department and for Brown recommending the termination of her employment in response to Slack's allegation. The Court does not find Slack's oral allegation and the investigation that followed could be characterized as sufficiently extreme and outrageous to give rise to a claim of intentional infliction of emotional distress under Oklahoma law.

Plaintiff's intentional infliction of emotional distress claim against Brown lacks merit. Brown terminated Plaintiff's employment, followed by the City Manager's affirmance, as a result of an

extensive internal investigation into Slack's allegation he had seen Plaintiff and Dawson engaged in sexual intercourse within the confines of Police headquarters. While the results of the investigation neither exculpate Plaintiff nor prove Slack's allegation, the Court is of the opinion Brown's decision to terminate Plaintiff was not unreasonable under the circumstances and evidence. Plaintiff herself testified she thought the investigation was probably complete and she did not know whether Brown's recommendation to terminate was in good faith or retaliatory. (Plaintiff's Brief, Ex. 1, pg. 90). Brown's actions do not rise to the level of egregious conduct required under Eddy v. Brown, *supra.* Thus, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Plaintiff's claim of intentional infliction of emotional distress.

G. Title VII Sexual Harassment[2]

1. Hostile Work Environment

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's sex. 42 U.S.C. § 2000e-2(a)(1). "Employer" is defined as a "person engaged in an industry affecting commerce... and any agent of such a person." 42 U.S.C. § 2000e(b).

Sexual harassment is now universally recognized as a form of employment discrimination. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The 10th Circuit has recognized hostile work environment as a distinct category of sexual harassment. Hicks

[2]It appears from the record Plaintiff complied with administrative exhaustion by filing her Equal Employment Opportunity Commission complaint. (Plaintiff's Brief, Ex. 1, p. 58, p. 118).

v. Gates Rubber Co., 833 F.2d 1406, 1413 (1987). Hostile work environment harassment arises when sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Id. Sexual harassment is behavior "'that would not occur but for the sex of the employee'... 'If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination'" Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995). Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. Meritor Savings Bank v. Vinson, *supra.* To be actionable as hostile work environment sexual harassment under Title VII, conduct need not "seriously affect [an employees] psychological well-being" or lead the plaintiff to "suffe[r] injury." Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

A hostile work environment sexual harassment claim may arise from harassing conduct of co-workers. Marshall v. Nelson Elec., 766 F.Supp. 1018 (N.D.Okla. 1991). Three alternative bases exist for holding an employer liable for an agent's hostile work environment sexual harassment. An employer may be held liable for an agent's hostile work environment sexual harassment if (1) the agent is acting within the scope of their employment; (2) it is established the employer, through its agents or supervisory personnel, knew or should have known of sexual harassment and failed to implement prompt and corrective action; or (3) it is established the agent purported to act or to speak on behalf of the employer and there was reliance upon the apparent authority. Hirschfield v. New Mexico Corrections Dept., 916 F.2d 572 (10th Cir. 1990). The last two alternative bases do not require the employee to be acting within the scope of their employment. *Id.* at 577-578.

The Court is of the opinion Plaintiff's only possible avenue of imputing liability to the City for any alleged sexual harassment creating a hostile work environment is under the second alternative. The Court believes a fact question exists as to whether numerous instances of alleged inappropriate behavior by various City personnel, including Slack, unreasonably interfered with Plaintiff's performance of her job and created an intolerable working environment.[3] Assuming it is found such behavior did create a hostile work environment, the Court believes a fact issue exists as to whether the City, via its agents in the Bartlesville Police Department, knew of the alleged harassing conduct of the various City employees. The Court does not find support in the record for a claim of hostile work environment sexual harassment against the City based on the conduct of Metzinger or Brown.

The Court hereby DENIES the City's Motion for Summary Judgment on Plaintiff's claim of hostile work environment under Title VII.

2. Retaliatory Discharge

Although not actually plead as such, the Court is of the belief Plaintiff's claim of First Amendment retaliation by the City for her accusing Sergeant Embry of sexual harassment is more appropriately brought under the auspices of a Title VII retaliatory discharge claim.

A three-step burden-shifting analysis has been developed by the Supreme Court for application in Title VII cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) (*citing* Sorensen v. City of Aurora, 984 F.2d 349, 351 (10th Cir. 1993)). In

[3]The numerous instances of coworker misconduct Plaintiff claims created a hostile work environment are detailed at Plaintiff's Brief, Ex. A p. 90 through p. p. 118

order to support a claim of retaliation,

> [a] plaintiff must first establish a *prima facie* case of retaliation. If a *prima facie* case of retaliation is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

Sauers v. Salt Lake, *supra* at 1128.

In order to establish a *prima facie* case of retaliation, a plaintiff must prove three elements: "(1)... participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action." *Id.* (*citing* Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993)).

Plaintiff does meet the first two elements of her *prima facie* case of retaliation by showing she filed a complaint of sexual harassment against Sergeant Embry (July 1992) and she was terminated from her job (August 1994). The Court believes it equitable to allow Plaintiff an opportunity to prove a causal connection exists between her reporting Sergeant Embry and her ultimate termination.

The Court believes the City has produced a legitimate, nondiscriminatory reason for terminating Plaintiff's employment in light of Slack's allegation and the subsequent internal investigation. However, the Court believes Plaintiff deserves an opportunity to show the City's reason was pretextual, assuming of course, Plaintiff is able to establish her *prima facie* case of retaliation through admissible evidence.

The Court hereby DENIES Defendants' Motion for Summary Judgment on Plaintiff's converted claim of retaliatory discharge in violation of Title VII.

H. Plaintiff's Claims Against Defendants Metzinger, Brown and Slack in their Official and Individual Capacities

In her Amended Complaint, Plaintiff brings seven causes of action (First Amendment retaliation, due process violations, invasion of privacy, wrongful termination, defamation, intentional infliction of emotional distress, and sexual & hostile work environment (sic)). Instead of specifying which claims were brought against which Defendant and in what capacity, Plaintiff brings her claims against each Defendant in their official and individual capacities.

Consistent with the Court's rulings, Plaintiff's claims of First Amendment retaliation, due process violations, invasion of privacy, wrongful termination, defamation and intentional infliction of emotional distress against Metzinger, Brown and Slack in their official and individual capacities are hereby DISMISSED.

Similarly, the Court hereby DISMISSES Plaintiff's Title VII claims against Metzinger, Brown and Slack in their individual capacities. Haynes v. Williams, 88 F.3d 898 (10th Cir. 1996).

IV. Conclusion

Defendants' Motion for Summary Judgment is GRANTED as to Plaintiff's claims of First Amendment retaliation, due process violations, invasion of privacy, wrongful termination pursuant to Oklahoma public policy, defamation and intentional infliction of emotional distress.

The Court DENIES the City's Motion for Summary Judgment as to Plaintiff's Title VII claims of hostile work environment and retaliatory discharge.

Plaintiff's claims against Metzinger, Brown and Slack in their official and individual capacities are hereby DISMISSED.

IT IS SO ORDERED this 24th day of September, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

INTER CHEM COAL COMPANY, a wholly owned subsidiary of INTERNATIONAL CHEMICAL COMPANY, INC., an Oklahoma corporation,

Plaintiff,

v.

W.K. JENKINS, a Missouri resident,

Defendant.

Case No. 94-C-280-K

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This report and recommendation pertains to the Intervenor's Motion for Summary Judgment (Docket #41), the Response to the Motion for Summary Judgment (Docket #44), and the Reply to Inter Chem's Response to Farmers' Motion for Summary Judgment (Docket #47).

Plaintiff sued defendant as surety on a performance bond relating to surface coal mining and reclamation operations executed to the benefit of plaintiff. On February 6, 1995, the court granted plaintiff's motion for summary judgment against defendant in the amount of $150,000.00, plus interest. Collection efforts ensued, and the dispute at issue resulted.

It is uncontroverted that on July 18, 1994, a letter of credit was issued by Farmers State Bank, Pleasanton, Kansas ("Farmers") in favor of the Oklahoma Department of Mines ("ODOM") for the account of defendant relating to reclamation

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work in Wagoner County, Oklahoma under permit #91/96-4218. The irrevocable letter of credit was accompanied by a letter from Farmers to Mr. James Hamm, Director of ODOM, dated July 18, 1994 stating that "[t]his is a Irrevocable Letter of Credit for Mr. W.K. Jenkins for $216,600.00 . . . . This is issued to cover Permit 91/96-4218, Section 1, T16N, made to Green Acres Enterprises in Wagoner County, Oklahoma." (See Ex. "A-2" to Intervenor's Motion for Summary Judgment, Docket #41). However, the actual irrevocable letter of credit for the account of defendant did not limit its use to reclamation on Permit 91/96-4218, but was unconditional as to the use to which it would be applied. (See Exhibit "A" of the Response to Motion for Summary Judgment, Docket #44).

On the same date, defendant signed a promissory note to Farmers for $216,600.00, which was secured under an earlier Security Agreement dated January 4, 1993. See Exhibit "A-1," Exhibit "A-3," and Affidavit of Dale Sprague, all of which are attached to Intervenor's Motion for Summary Judgment (Docket #41).

A collateral bond agreement was issued on July 22, 1994 by ODOM, referencing Permit No. 91/96-4218, and listing the letter of credit from Farmers as collateral, which allowed defendant to perform surface mining on the Wagoner property (See Exhibit "A-2" of Intervenor's Motion for Summary Judgment, Docket #41). Some months later, ODOM called the entire $216,600.00 letter of credit, and Farmers paid the full amount. (See Affidavit of Dale Sprague attached to Intervenor's Motion for Summary Judgment, Docket #41, and Exhibit "B" to the Response to the Motion for Summary Judgment, Docket #44).

When defendant defaulted on the reclamation obligation to ODOM, the letter of credit was levied upon and the monies being held on behalf of defendant were sought by plaintiff through a garnishment issued and served on ODOM (Docket #27). Farmers was allowed to intervene in this case to claim an interest in the remaining funds from the letter of credit which were not used by ODOM for the reclamation project (Docket #40). ODOM tendered the remaining funds into court, and defendant's claim for exemption was denied.

Farmers argues that the letter of credit and the collateral bond agreement clearly establish that the proceeds of the letter of credit were to be used for the specific purpose of reclamation on permit 91/96-4218 and, to the extent the letter of credit was overcalled, the excess proceeds were its property and not defendant's, and so were not subject to plaintiff's garnishment lien. Alternatively, if the court were to find that the excess proceeds belonged to the defendant, Farmers contends that its security interest in future "accounts receivable" collateral is superior to plaintiff's subsequent garnishment.

On the merits, plaintiff argues that none of the funds which are the subject of plaintiff's garnishment can be considered accounts receivable, and therefore any security interest, if valid, would not apply. It points out that ODOM made demand for payment of the entire $216,600.00 letter of credit when defendant defaulted on the compliance schedule for the job. (See Exhibit "B" to the Response to the Motion for Summary Judgment). On September 29, 1995, Farmers received collateral from defendant in the form of a $200,000.00 certificate of deposit. (See Exhibit "C" to the

Response to the Motion for Summary Judgment). On January 23, 1996, a check for $216,600.00 was sent to ODOM on letter of credit number 5213 for the benefit of defendant by Farmers (See Exhibit "D" to the Response to the Motion for Summary Judgment). On January 25, 1996, ODOM acknowledged receipt of the $216,600.00, discharged Farmers from all obligations and liabilities under the letter of credit, and returned the original letter of credit to Farmers. (See Exhibit "E" to the Response to the Motion for Summary Judgment). Plaintiff argues that therefore Farmers has no right, title, or interest in the funds held on behalf of defendant.

The law is clear that:

> a letter of credit involves three parties: (1) an issuer (generally a bank) who agrees to pay conforming drafts presented under the letter of credit; (2) a bank customer or "account party" who orders the letter of credit and dictates its terms; and (3) a beneficiary to whom the letter of credit is issued, who can collect monies under the letter of credit by presenting drafts and making proper demand on the issuer.

Arbest Construction Co. v. First Nat'l Bank & Trust Co., 777 F.2d 581, 583 (10th Cir. 1985). The issuer substitutes its credit, preferred by the beneficiary, for that of the account party, and must honor a demand for payment without considering problems with the underlying transaction. Id. at 583-584. The issuer is immune from policing the underlying transaction because it lacks control over it, or perhaps even knowledge of it. Id. at 584. "This lack of control gives the letter of credit its commercial vitality." Id.

An issuing bank must pay the beneficiary "out of its own funds, and then must look to the account party for reimbursement." Centrifugal Casting Machine Co., Inc.

v. American Bank & Trust Co., 966 F.2d 1348, 1352 (10th Cir. 1992) (emphasis in original). The issuer's obligation to pay on the line of credit is totally independent from the underlying commercial transaction between the beneficiary and the account party. Id. An issuer must honor a proper demand even if the beneficiary has breached the underlying contract. Id. The principle is "essential to the proper functioning of a letter of credit . . . ." Id.

Farmers issued an irrevocable letter of credit in favor of ODOM for defendant's account in the amount of $216,600.00. When ODOM called the letter of credit, the bank was obligated to the unconditional payment and surrender of $216,600.00. ODOM's right to the full amount of funds was not affected by defendant's breach of his agreement with ODOM. Farmers has no recourse to recover funds issued under the letter of credit except to levy upon collateral given by defendant or to file a separate lawsuit against him.

Farmers cites In re Eastern Freight Ways, Inc. v. Seaboard Surety Company, 9 B.R. 653, 661 (1981), for the proposition that the language of the letter of credit required the proceeds to be used only for reclamation work in Wagoner County, not for payment of defendant's judgment creditors, since the accompanying letter referenced the reclamation project. However, there was no limiting language in the actual letter of credit concerning the use of the funds by ODOM, conditions relating to the draw down, or a retention of interest in unused proceeds by Farmers. The Eastern Freight Ways court actually stated that the terms of the letter of credit "do not govern the use of proceeds after draw down, for when the proceeds are in the

beneficiary's hands the underlying agreement controls . . . ." Id. at 662. The court pointed out that a letter of credit, unlike a guaranty, "creates a primary obligation on the part of the issuer, not qualified by or dependent on performance by anyone else and whose obligation is exclusively defined by the credit." Id. at 661. The letter of credit

> is merely a promise by the issuing bank to pay money in order to facilitate a commercial transaction by assuring such payment. No matter how unusual the purpose for this facilitation, the letter must be viewed in the light of common sense principles developed to acknowledge the role of this unique device in the world of commerce and its function as a guarantee of payment. Mere general references to underlying agreements are surpluses and are not to be considered in deciding whether the beneficiary has complied with the terms of the credit.

Id. at 663.

There is no merit to Farmer's claim to a reversionary interest by virtue of the overpayment to ODOM, because the payment made precisely complied with its obligations under the letter of credit, and the letter of credit was not modified by a specific condition that the proceeds advanced be used only for a specific purpose.

The court next turns to Farmers' claim that the excess proceeds held by ODOM are accounts receivable in which it has a security interest superior to plaintiff's garnishment. Farmers notes that, under Oklahoma law, a security interest or mortgage in collateral is superior to a subsequently issued garnishment. First Mustang State Bank v. Garland Bloodworth, Inc., 825 P.2d 254 (Okla. 1991).

This is indeed the law in Oklahoma, and the court must examine whether the money held on behalf of defendant by ODOM constitutes collateral to which Farmer's

security interest attaches. This issue has been muddied by the parties by their framing of the issue as one of whether or not the excess monies held by ODOM constitute proceeds of an "account" or "account receivable." By definition, they are not. Under Okla. Stat. tit. 12A, § 9-106 "'account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." The collateral bond agreement which was funded by the letter of credit was a regulatory pre-condition to the commencement of defendant's mining operations. In a commercial sense, it had nothing to do with the sale of goods or the payment for services rendered.[1] However, there is no dispute that once the reclamation was completed, and was paid for out of the collateral bond proceeds, the ODOM was not entitled to reap a windfall, but was instead obligated to pay over the excess proceeds. When defendant, Farmers, and plaintiff all made claim to those proceeds, the instant controversy arose.

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[1] The Collateral Bond Agreement precisely defined the defendant's obligation, and self-terminated once those obligations had been met:

> [I]f the said operator shall faithfully perform all of the requirements of the Interim Regulations of Surface Mining Reclamation and Enforcement (Executive Order No. 78-24), and all conditions required in the permit issued to said operator as specified heretofore and designated in this bond (all of which are hereinafter referred to as the "law"); and such amendments or additions to the law as may hereinafter be lawfully made, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

Collateral Bond Agreement, attached as the second page of exhibit A-2 to Intervenor's Motion for Summary Judgment (Docket #41).

As Farmers was not entitled to that payment by virtue of its issuance of the letter of credit, ODOM was obligated to pay those proceeds to defendant.

Of course, the defendant, in turn, remains obligated to pay Farmers pursuant to the note[2] and security agreement[3] he signed to collateralize the letter of credit which funded the Collateral Bond Agreement, and is also obligated to plaintiff on the judgment rendered in this case.

There is no question but that Plaintiff, with its unsecured judgment, is entitled to the excess funds by way of its garnishment, unless Farmers has a prior, valid, secured claim. This it has. The security agreement signed by defendant provides:

> I give you [Farmers] a security interest in the property indicated below, whether I own it now or may own it in the future...
>
> Indicated by check mark is the following language:
>
> **Accounts, Instruments, Documents, Chattel Paper** and Other Rights to Payment: All right I have now or may have in the future to the payment of money including, but not limited to:
>
> (a) ..., and
>
> (b) rights to payment arising out of all ...obligations receivable. The above include any rights and interests... which I may have by law or agreement against any... obligor of mine. (underscore added)

Farmers' security interest is not limited to "accounts" but also includes any future right to payment of money.

Intervenor's Motion for Summary Judgment (Docket #41) should be granted.

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[2] See exhibit A-3 to Intervenor's Motion for Summary Judgment.

[3] See exhibit A-1 to Intervenor's Motion for Summary Judgment.

The funds in question, to the extent that the note obligation collateralized by the January 4, 1993 security agreement remains in default and unpaid, should be ordered released to Farmers. Once the secured obligation to Farmers is fully paid and satisfied, any remaining proceeds should be paid to plaintiff under the garnishment issued and served on ODOM (Docket #27).

Dated this 24th day of September, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 23 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRI-C ENERGY, INC., an Oklahoma corporation,

Plaintiff,

vs.

ICI EXPLOSIVES U.S.A., INC., a Delaware corporation,

Defendant.

No. 96-C-0134-H

SEP - 5

STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the Plaintiff, TRI-C ENERGY, INC., an Oklahoma corporation, and the Defendant, ICI EXPLOSIVES U.S.A., INC., a Delaware corporation, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate and agree to the dismissal of the above-caption cause of action, with prejudice.

DATED this 3rd day of September, 1996.

LOGAN & LOWRY
Attorneys for Plaintiff

By _____

STOOPS, SMITH & CLANCY, P.C.
Attorneys for Defendant

By _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN WAYNE LUNSFORD, JR.,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 96-CV-694-B

ORDER

On August 12, 1996, the Court denied Petitioner's motion for leave to proceed in forma pauperis and granted Petitioner thirty days to submit the $5.00 filing fee or his action would be dismissed. Petitioner has failed to submit the requested fee or seek an extension of time.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE.

SO ORDERED THIS 23rd day of Sept, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOANN LAGRONE,)
)
Plaintiff,)
)
vs.) Case No. 95 C-1235 K
)
PUROLATOR PRODUCTS, INC.,)
)
Defendant.)

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff's causes of action in this case against Defendant, Purolator Products, Inc.

DATED this 20th day of September, 1996.

JoAnn LaGrone, Plaintiff

Joy Kay Williams
2121 South Columbia, Suite 560
Tulsa, OK 74114

Attorneys for Plaintiff, Joann LaGrone

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: Kristen L. Brightmire
Kathy R. Neal
Kristen L. Brightmire
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Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant, Purolator Products, Inc.

THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN STATES INSURANCE COMPANY, Plaintiff,	)	
vs.	)	Case No: 95-C-1065H
JOHNNIE WHISMAN d/b/a WHISMAN CONSTRUCTION, and S.S.I., INC., Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the parties to this action, and in accordance with Rule 41(a)(1), file this Stipulation of Dismissal *with* prejudice as to all parties herein. The Defendant Johnnie Whisman d/b/a Whisman Construction has not entered any appearance, and default judgment has been granted as to him. The Defendant SSI, Inc. of Oklahoma and the Plaintiff state that their claims have been amicably resolved among the parties.

Respectfully submitted,

George Gibbs, OBA #11843
Holly Cinocca, OBA #16198
4606 S. Garnett, Suite 310
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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD M. HOLT,

Plaintiff,

vs.

D A C SERVICES, INC.,

Defendant.

Case No. 96-C-839-BU

DATE SEP 24 1996

ORDER

On September 12, 1996, Plaintiff, Richard M. Holt, pro se, filed a Complaint seeking damages against Defendant, D A C Services, Inc., in the amount of $10,000.00 for falsely publishing information concerning Plaintiff. The Complaint was accompanied by the $120 filing fee as required by 28 U.S.C. § 1914(a). However, no request was made to the Court Clerk for issuance of a summons. Upon initial review of the Complaint, the Court finds that it lacks subject matter jurisdiction over this case and that Plaintiff's Complaint must be dismissed in its entirety.

In order for a case to be heard in federal court, the district court must have subject matter jurisdiction over the case. The facts alleging subject matter jurisdiction must be plead in the complaint. Fed.R.Civ.P. 8(a)(1). The district court's subject matter jurisdiction is limited and is set forth generally in 28 U.S.C. §§ 1331 and 1332. Under these statutes, federal jurisdiction is available only when a "federal question" is presented (28 U.S.C. § 1331) or when plaintiffs and defendants are of diverse citizenship and the amount in controversy exceeds $50,000.00 (28 U.S.C. § 1332).

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"The Federal Rules of Civil Procedures direct that "'[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.'" Tuck v. United Services Automobile Association, 859 F.2d 842, (10th Cir. 1988)(quoting, Fed.R.Civ.P. 12(h)(3)). "'A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.'" Id. (quoting, Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)). Lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation." Id.

The Court finds that Plaintiff's Complaint does not provide a basis for federal jurisdiction. Plaintiff has not alleged a claim which arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. Consequently, no federal question is presented. In addition, there are no allegations as to the citizenship of Defendant, D A C Services, Inc. The Court therefore cannot determine from the face of the Complaint that there is complete diversity between Plaintiff and Defendant. Nevertheless, the Complaint specifically alleges that the amount in controversy between Plaintiff and Defendant is $10,000.00. As the amount in controversy must exceed $50,000.00 in a diversity case, see, Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir. 1995), the Court finds that federal jurisdiction is not available under section 1332.

Accordingly, Plaintiff's Complaint is **DISMISSED** for lack of

subject matter jurisdiction.

Entered this 23rd day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9/24/96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 23 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMIE H. CASTLE,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

Case No: 94-C-1118-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 23, 1996.

Dated this 25rd day of September, 1996.

JOHN LEO WAGNER,
UNITE STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMIE H. CASTLE,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 94-C-1118-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(I) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge James D. Jordan (the "ALJ"), which summaries are incorporated herein by reference.

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.[3] He found that claimant's insured status for disability insurance benefits expired on September 30, 1980, and prior to that date she had a residual functional capacity to perform work-related activities, except for work involving lifting over 25 pounds and prolonged walking and standing, to include the ability to perform work which requires no more walking than is incidental to ordinary

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[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

office desk work but requires standing two hours per day, sitting five hours per day, and frequent bending, with the greatest weight ever required to be lifted to be twenty pounds. The ALJ found that, as of September 30, 1980, the claimant was 48 years old, had completed high school, had worked over three years as an insurance billing clerk, and was qualified to perform such work, which was her past relevant work. The ALJ concluded that this past relevant work as an insurance billing clerk, as she performed that work, did not require the performance of work-related activities precluded by the above limitations, and her impairments did not prevent her from performing her past relevant work, as she performed that work. Having determined that claimant's impairments did not prevent her from performing her past relevant work prior to September 30, 1980, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ failed to make any findings with regard to claimant's pain.

(2) The ALJ disregarded the testimony of Dr. Harold Goldman that claimant suffered from a chronic pain syndrome.

(3) The ALJ did not properly make findings as to the specific requirements of claimant's past relevant work, both as she actually performed it and as it is generally performed in the national economy.

(4) The ALJ did not ask the vocational expert a proper hypothetical question which took into account claimant's nonexertional impairments.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that she could not work after August of 1975 because of chronic pain, mainly in her hips and legs (TR 47, 50). On January 12, 1993, this court affirmed the report and recommendation of the United States Magistrate Judge finding that the ALJ in a September 1990 decision properly analyzed plaintiff's subjective complaints of pain, but did not clearly examine her ability to do her past work (TR 604-614). The Magistrate Judge found that the ALJ examined both plaintiff's testimony and all of the other relevant evidence submitted in the record, including that of the treating physicians and other medical experts, and correctly concluded that substantial evidence showed that plaintiff's pain was not disabling. The Magistrate Judge determined that the ALJ's analysis of whether plaintiff could return to her past job as a billing clerk was unclear, and, therefore, in error, and remanded the case on this issue to determine if plaintiff could return to her past relevant work or work elsewhere in the national economy.

There is therefore no merit to claimant's first claim that the ALJ in his October 19, 1993 decision erred in failing to make any findings with regard to claimant's pain. The ALJ expressly adopted the findings of the September 13, 1990 ALJ decision in which an exhaustive pain analysis pursuant to Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) was conducted (TR 17-18, 594-595). The pain finding was not subject to review in the October 19, 1993 order.

There is also no merit to claimant's second contention that the ALJ disregarded the testimony of Dr. Harold Goldman that she suffered from a chronic pain syndrome. Dr. Goldman did state at a hearing on August 17, 1990 that "[i]t would appear from the documentation that the claimant's particular difficulty was on the basis of a sensory difficulty. She has been described by Dr. Holtz, I believe, and Dr. Hastings, as having a hemisensory parathesia (Phonetic). In other words, she was not paralyzed, but she had a sensory loss. This would correlate very well with the patient's pain syndrome that she has now." (TR 116-117). But, significantly, the doctor stated on September 22, 1989, as follows:

> Certainly pain would marginally limit her ability to perform work-like activities, but I believe this limitation would be minimal. There was no notation on any of the records reviewed that this patient is having associated mental problems and there is no indication that this patient had any psychiatric care.
>
> This patient should be able to perform reasonable work-like activity which would involve walking, bending, stooping and lifting. This is certainly supported by her negative myelogram and the fact that the white cells and protein have decreased to near normal in her spinal fluids and one would expect no further progression of her arachnoiditis.

(TR 553). Dr. Goldman clearly found that claimant could work and pain only marginally limited her abilities.

There is no merit to claimant's third contention that the ALJ did not properly make findings as to the requirements of claimant's past relevant work, both as she actually performed it and as it is generally performed in the national economy. This assertion ignores the well-settled principle that a claimant may be found not disabled at the fourth step if she can perform either her actual past job or her past type of job.

20 C.F.R. § 416.920(e); Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987). The ALJ relied on claimant's own statements that her past relevant work required her to stand for up to two hours, sit for five hours, and lift up to twenty pounds (TR 228, 232, 595). He also noted that the vocational expert testified as follows:

> Q [L]et me ask you this question. Before September 30 of 1980, did all billing clerk positions require computer skills? From what we've already heard here, it's obvious that she did not.
>
> A When I reviewed the file and saw that her work period was '73 to '75, I went to the 1977 Dictionary of Occupational Titles. It did not include computer skills. The 1991 Dictionary of Occupational Titles does include computer skills.
>
> Q Did you happen to look at any of the intervening years? Do you know when that change took place according to the DOT?
>
> Q No, sir, I do not, but I would assume that it would be into the '80s -- mid '80s, early '80s.
>
> Q Let me ask you to -- let me ask a question here. I want you to assume a 48 year-old woman, who has completed high school, who has worked over three years as an insurance billing clerk and was qualified to perform that work, which required no more walking than is incidental to ordinary office desk work, did require standing two hours per day and sitting five hours per day. The greatest weight ever required to lift was 20 pounds. The work involved frequent bending. Now before September 30 of 1980, would you have expected this hypothetical person to have been able to have performed the past relevant work of this claimant as a insurance billing clerk?
>
> A Yes, sir.

(TR 595, 893-894).

The ALJ noted that in 1991 edition of the Dictionary of Occupational Titles, such position did include the use of computer skills. (TR 595). He also relied on the

fact that all the medical records submitted by claimant after the September 13, 1990 decision pertained to claimant's medical condition well after 1980, so were not relevant. The ALJ properly considered a statement by a co-worker of the claimant regarding the working conditions in the industry in which claimant worked, but gave greater weight to the claimant's own description of her work and the opinion of the vocational expert testifying at the hearings. (TR 66-82, 596, 805, 880). The ALJ did not need to make additional findings as to the requirements of claimant's past relevant work as it was generally performed in the national economy.

Finally, there is no merit to claimant's contention that the ALJ did not ask the vocational expert a proper hypothetical question. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially, the ALJ established that the vocational expert had been present for all of the testimony and studied the record. (TR 893). It was proper for the ALJ to limit the hypothetical questions to those impairments which were actually supported in the record. Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that

the ALJ properly deemed unsubstantiated. (TR 894). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 20th day of September, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOB M. GUNN,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

Case No: 95-C-865-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 23, 1996.

Dated this 23rd day of September, 1996.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOB M. GUNN,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 95-C-865-H

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge James D. Jordan (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence

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[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant had the residual functional capacity to perform the physical exertion requirements of work, except for lifting more than fifty pounds occasionally and twenty-five pounds frequently. He found no significant work-related nonexertional limitations, but concluded that claimant should not be

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[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Matthews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

required to work alone, which would not significantly erode his occupational base. The ALJ concluded that claimant was unable to perform his past relevant work as a Radio Shack manager because it required lifting and carrying one hundred pounds. The ALJ found that claimant had the residual functional capacity to perform the full range of medium work, was 26 years old, which is defined as a younger individual, and had a Bachelor of Science Degree in Finance. Considering the claimant's residual functional capacity, age, education, and work experience, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) Substantial evidence does not support the ALJ's finding that claimant could perform a full range of medium work, because he improperly applied the medical vocational guidelines (Grids) and failed to obtain vocational expert testimony.

(2) The ALJ erred by failing to award Claimant benefits for a closed period from August 10, 1991 to June 21, 1993.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that he has been unable to work since August of 1991 because of injuries suffered when he was shot in an armed robbery (TR 69-70, 128). He was employed as a manager of a Radio Shack and was opening the store for business on August 10, 1991, when he was robbed by two teenagers who shot him four to five times, damaging both shoulders and the abdominal area (TR 68-69, 168-

170). He underwent surgery for repair of the aorta, suture of the portal superior mesentery vein, repair of gunshot wounds of the duodenum, debridement of a pancreatic gunshot wound, and a pancreatectomy (TR 172).

An abdomen (KUB) x-ray performed August 10, 1991 showed a partially fragmented small gauge bullet projected over the transverse process of L4 on the left side. (TR 198). A routine chest x-ray performed on August 30, 1991, again showed a bullet in the right chest soft tissues (TR 217). He was discharged from the hospital on September 2, 1991 (TR 166).

Claimant was readmitted to the hospital on September 12, 1991 due to postoperative pancreatitis and infection, secondary to the previous gunshot wound of the pancreas (TR 219-246). He was discharged on October 14, 1991 (TR 219).

Five months after claimant was injured, on January 30, 1992, Dr. James Lockhart, his treating physician, wrote:

> At this time the patient has been released having received what I consider to be maximum medical improvement. Problems that he might have include pancreatic insufficiency with digestive disturbances requiring medication and digestive enzymes, insulin dependent mellitus, intra-abdominal adhesions that might cause obstruction of the intestine requiring further surgery, and intermittent pain in his incision. Likewise, there is scar in the left iliopsoas muscle secondary to a bullet wound and retained bullet fragment. This could cause back pain.
>
> At the current time he is functioning relatively normally with occasional back pain and abdominal discomfort. He is eating a fairly normal diet and currently has no evidence of diabetes or pancreatic insufficiency.

(TR 299). (emphasis added).

On May 14, 1992, Dr. William Gillock concluded:

> In my opinion, Mr. Gunn has sustained a 5% permanent partial impairment to his abdomen based on a Class I impairment of the upper digestive tract . . . no additional permanent impairment to his right arm, left arm, right shoulder or left shoulder . . . [and] a 10% permanent impartial impairment, related to psychological overlay from this incident. In my opinion, Mr. Gunn is not permanently and totally disabled, based on age, education, training and experience.

(TR 305). (emphasis added).

On September 28, 1992, Dr. Jeffrey DeMouy ran a series of gastrointestinal tests and concluded:

> I see no focal abnormality of the esophagus, stomach or duodenum on today's examination. According to history, the patient reports having a gunshot wound passing "through the stomach." The stomach appears intact with no focal defect or irregularity demonstrated. There is some mild widening of the C-sweep of the duodenum. The jejunum and ileum appear free of any focal defect or area of narrowed or distorted small bowel.

(TR 263).

Claimant contends that he cannot work because of psychological problems (TR 128). On March 9, 1992, Dr. Michael Farrar evaluated claimant and found that, while he still complained of nausea, bloating, bowel disturbances, and headaches, he had reached maximum medical recovery, but needed psychological care (TR 265-266). The doctor concluded that he was 45% impaired as a result of the gastro intestinal problems, 10% impaired in the arms, and 20% impaired by psychological problems (TR 266-267). The doctor stated:

> I am furthermore of the opinion that as Mr. Gunn stands at this time he is permanently and totally disabled. He shows to have significant psychological and physical concerns that in my opinion will preclude him from returning to the work force in any capacity. On the basis of the multiplicity of injuries, including his psychological state, it

> is my opinion that he is unable to earn any wages in any employment for which he is or could become physically suited or reasonably fitted by education, training, or experience, and is considered 100 percent permanently and totally disabled . . . periods of temporary total disability extend from August 10, 1991, until released from Dr. Lockhart's care on January 22, 1992.

(TR 267).

On June 30, 1992, claimant was given a psychological evaluation by Dr. Nelda Ferguson. She performed a battery of tests and concluded that he had psychomotor retardation in all eye-hand-motor tests, but a verbal I.Q. of 116 and a performance I.Q. of 99, which yielded a full scale I.Q. of 108 and placed him in the bright to high average range of intelligence (TR 252). She stated that his "near death experience" had left him with a post traumatic stress disorder and depression (TR 253). She found that his ability to interpret reality was severely impaired, affecting his judgment in all areas, specifically about his health (TR 253). She stated:

> As a consequence of constraining his feelings and submerging his intense ambivalence, he is likely to exhibit a history of bodily complaints and functional symptoms.
>
> . . . .
>
> The MMPI profile presents a mixed pattern of symptoms in which somatic reactivity under stress is a primary difficulty. This man presents a picture of physical problems and a reduced level of psychological functioning. He appears to manage conflict by excessive denial and repression. MMPI Scales: Hypochrondrical = T=92; Depression = T=89; Hysteria = T=96.
>
> . . . .
>
> He is experiencing a moderately severe dysthymia which appears related to the near death experience, feelings of insecurity and inadequacy and feelings of helplessness and hopelessness. Turning

matters inward, he has become increasingly self-derisive and preoccupied over matters of personal adequacy and concerns that are compounded by a fear of being abandoned.

(TR 254-255).

On July 22, 1992, Dr. Thomas Donica evaluated claimant, reviewed his medical records, and concluded:

> [claimant has] (1) Post Traumatic Stress Disorder, with features of dysthymia; (2) Features of Dependent Personality Disorder . . . . The treatment I recommend is outpatient psychotherapy on a weekly basis and treatment with medication. The medication which I think will be of help to him is Tofranil. In my opinion, he will be in need of treatment for approximately twelve to sixteen months. In my opinion, the probability is great that with proper treatment, he will substantially recover from his Post Traumatic Stress Disorder, with features of dysthymia.
>
> From a psychiatric point of view, in my opinion, Mr. Bob Gunn, Jr. is able to engage in full time gainful employment. In my opinion, from a psychiatric point of view, he is able to perform any kind of work that is within his physical limitations and for which he is qualified, with the exception of retail sales work.
>
> . . . .
>
> Mr. Bob Gunn, Jr. suffers zero permanent partial impairment due to mental and behavioral disorders related to his injury of August 10, 1991.

(TR 312). (emphasis added).

On December 9, 1992, Dr. Farrar re-examined and re-evaluated claimant (TR 291, 292). He noted that claimant had advised him that he was undergoing group therapy with Dr. Joe Fermo, which he said had helped him quite a bit, and that he was learning how to adapt (TR 291). Although the doctor noted that claimant's psychological status had improved and that he had benefitted through therapy, he

continued to opine that claimant was 100 percent permanently and totally disabled (TR 291).

On April 2, 1993, Dr. Harold Goldman evaluated claimant's medical records and responded to a series of questions posed by the ALJ (TR 280-281). Dr. Goldman stated that, since the alleged onset date, claimant had not met a listing or combination of listings nor had he been impaired by a condition or combination of conditions that were medically equivalent to a listing (TR 280). Dr. Goldman stated that, although the claimant had a decrease in his residual functional capacity for approximately six months due to prolonged abdominal surgery and a residual pancreatitis attack, his ability at the end of this period to perform work-like activity was not limited and activities such as standing, walking, sitting, lifting, bending, balancing, seeing and hearing were not limited (TR 280). Dr. Goldman found that the claimant had two medical conditions (TR 280). Claimant's pancreatic insufficiency had not caused any excessive weight loss or diabetes mellitus and thus was not medically disabling, although it required him to take oral pancreatic enzymes (TR 280). Dr. Goldman identified claimant's main difficulty as psychological, and found that he would be characterized as having both affective disorders and panic disorders or post-traumatic stress disorders (TR 281). Dr. Goldman found no information concerning difficulties with social concentration or decompensation in work or work-like settings, except for the claimant's inordinate fear of black males (TR 281).

On June 3, 1993, Dr. Joe C. Fermo stated in a letter to claimant's attorney that he initially saw claimant on September 29, 1992, confirmed the diagnosis of Post

Traumatic Stress Disorder, and placed claimant on a regimen of treatment, including individual and group therapy and anxiolytic medication for panic attacks, disturbances in his sleep pattern, agoraphobia, and depression (TR 294). Dr. Fermo opined that claimant had made considerable improvement to the point that he did not confine himself to his home and improved his social life, although he still became panicky and discomforted when around black people (TR 294). Dr. Fermo stated that claimant was having fewer therapy sessions, had overcome some of his panic attacks, and had improved with treatment (TR 294). He claimed that claimant hoped to obtain gainful employment as long as it was not within a situation of being isolated (TR 294).

On November 4, 1993, Dr. Fermo completed a mental medical assessment of claimant's ability to do work-related activities (TR 320-322). He opined that claimant's ability to relate to co-workers, interact with supervisors, function independently, and maintain concentration and attention was unlimited/very good (TR 320). He rated claimant's ability to follow work rules, deal with the public, use judgment with the public, and deal with work stresses as good (TR 320). He rated claimant's ability to understand, remember and carry out complex job instruction and detailed, but not complex, job instructions as good, and simple job instructions as unlimited/very good (TR 321). He found that claimant's ability to maintain personal appearance and behave in an emotionally stable manner was unlimited/very good and ability to react predictably in social situations and demonstrate reliability was good (TR 321). Dr. Fermo also stated that claimant continued to have panicky feelings when he saw black people in isolated situations (TR 322).

There is no merit to claimant's first assertion that substantial evidence does not support the ALJ's finding that claimant could perform a full range of medium work, because he improperly applied the medical vocational guidelines (Grids) and failed to obtain vocational expert testimony.

There is substantial evidence that the claimant retained the residual functional capacity to perform the full range of medium work and had no significant work-related non-exertional limitations which would prevent him from performing substantial gainful activity. Under 20 C.F.R. § 404.1567, medium work involves lifting no more than fifty pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five pounds. If someone can do medium work, the regulations determine he can also do sedentary and light work, which require a good deal of walking, standing, or sitting. 20 C.F.R. § 404.1567.

The ALJ placed emphasis on the treating physicians' opinions. Dr. Lockhart found that claimant had made essentially a full vocationally related recovery and was able to be released to return to work on January 30, 1992, approximately five months after his initial injury (TR 19, 24, 299). The claimant was described as "functioning relatively normally," and the only work related problem noted was occasional abdominal and back discomfort (TR 299). Dr. Fermo, his therapist, also concluded by November 4, 1993 that claimant was able to perform work-related activities (TR 19, 21, 24, 320-322).

The ALJ also took into consideration the claimant's testimony concerning his physical and daily activities (TR 18-19). Though the ALJ found claimant had a severe

emotional impairment, he did not believe it would impair his ability to work (TR 24). He noted that the claimant "probably should not work alone," but that this limitation would not significantly erode his occupational base (TR 25). The ALJ placed emphasis on the fact that claimant had successfully returned to work on June 21, 1993 and had worked in excess of ten months, with no special considerations or reduction in pay or duties (TR 25).

Claimant argues that the ALJ erred in finding that he could perform medium work. He claims that he can only stand for 30 minutes, for a total of two hours in an eight hour day, sit two hours, but only a total of 3 hours in an 8-hour day, lift 25 pounds, and walk approximately one mile (TR 66-67, 74-75). Claimant also alleges that he experiences residual abdominal discomfort, constipation, diarrhea, and psychological problems (TR 61-62, 64-65). He testified that he had been told to see a gastroenterologist, but he had not gotten around to it (TR 23, 71). There is no evidence that his pain requires the use of any medication - either prescribed or over-the-counter. The ALJ noted that claimant's testimony did not reveal any physical basis for limiting his activities (TR 23, 198).

While an ALJ must consider claimant's allegations, he is not bound by subjective allegations. Thompson v. Sullivan, 987 F.2d 1482, 1488 (10th Cir. 1993); Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). Medical records must be consistent with the nonmedical testimony as to the severity of the pain. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ may discount subjective complaints of pain when there is a lack of objective

corroborative evidence. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

The claimant also alleges that the ALJ did not consider his nonexertional limitation of psychological problems including: major depression, panic attacks, personality disorders, dysthymia and post-traumatic stress disorder. There is no merit to this claim. The ALJ found that claimant's medical records demonstrated a significant improvement in his psychological condition since the time of the injury (TR 23). The ALJ pointed out that a nontreating Worker's Compensation psychiatrist, Dr. Farrar, opined that claimant had an improved psychological status (TR 24). The ALJ placed primary weight on Dr. Fermo's opinion, which clearly established that after therapy claimant had no significant limitations on his ability to function in a work place setting (TR 24).

When evidence of a disabling mental impairment is presented, the ALJ must follow the procedure outlined in 20 C.F.R. § 404.1520a. Cruse v. Dept. of Human Servs., 49 F.3d 614, 617 (10th Cir. 1995); Tibbits v. Shalala, 883 F. Supp. 1492, 1498 (D. Kan. 1995).

> This procedure first requires the Secretary to determine the presence or absence of 'certain medical findings which have been found especially relevant to the ability to work' sometimes referred to as the 'Part A' criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The Secretary must then evaluate the degree of functional loss resulting from the impairment, using the 'Part B' criteria [of the Listings]. [20 C.F.R.] § 404.1520a(b)(3). To record her conclusions, the Secretary then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and Part B criteria. At the ALJ hearing level, the regulations allow the ALJ to complete the PRT form with or without

> the assistance of a medical advisor and require the ALJ to attach the form to his or her written decision.

Cruse, 49 F.3d at 617 (citation omitted).

The ALJ followed this procedure in this case. When completing the PRT form, the ALJ found only a slight degree of limitation of the claimant's activities of daily living (TR 32). He found that the claimant was able to function normally, evidenced also by the fact that he had returned to work (TR 25, 32). The ALJ noted only a slight degree of limitation with respect to difficulties maintaining social functioning (TR 32). The ALJ concluded that claimant is able to function normally in society, except for his fear of black males (TR 25). The ALJ found that claimant had only seldom deficiencies of concentration (TR 32). The ALJ found no evidence of any deterioration or decompensation in work or work-like settings (TR 32). Essentially, the ALJ found that claimant's mental impairment did not significantly limit him in any of the four functional areas measured by Part "B" of Listings 12.04 and 12.06.

Claimant argues that the ALJ improperly applied the Grids because there was not an exact match between any one residual functional capacity and claimant's impairments. However, the presence of a nonexertional impairment does not prevent the ALJ from relying on the Grids; use of the Grids is only precluded to the extent that the nonexertional impairments further limit the claimant's abilities to perform work at the applicable exertional level. Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1030 (10th Cir. 1994), citing Eggleston v. Bowen, 851 F.2d 1244, 1247 (10th Cir. 1988)). The ALJ properly concluded that such nonexertional

impairments did not exist.

Claimant also argues that, because his non-exertional impairments severely limit his ability to perform a full range of work, the testimony of a vocational expert was required to determine whether jobs exist in the national economy that he can perform. The court in Hargis v. Sullivan, 945 F.2d 1482, 1491 (10th Cir. 1991), concluded that "[w]henever a claimant's residual functional capacity is diminished by both exertional and nonexertional impairments, the Secretary must produce expert vocational testimony or other similar evidence to establish the existence of jobs in the national economy." However, in this case, the ALJ found that the claimant's residual functional capacity was not diminished by nonexertional impairments, and therefore he was not required to call a vocational expert.

There is no merit to claimant's second assertion that he is entitled to benefits for a closed period from August 10, 1991 to June 21, 1993 when he returned to work. "The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 CFR § 404.1505(a).

Claimant's treating physician, Dr. Lockhart, released him to work on January 30, 1992, approximately five months after the date of his injuries (TR 299). The only deficiencies noted were occasional back pain and abdominal discomfort (TR 299). The ALJ found "there is . . . little doubt that the claimant became fully capable of returning to work activities within 12 months of the date of his injuries." (TR 25).

Though psychological impairments were noted, none were severe enough to prevent the claimant from working (TR 25). Since the claimant's impairments did not last a continuous period of twelve months, the ALJ did not err in failing to award claimant disability benefits for the period from August 10, 1991 to June 21, 1993.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 20th day of September, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLEN A. RILEY, Plaintiff,	)	
v.	)	No. 96-C-120B
CAROLE A. RICHARDS and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 20th day of Sept., 1996, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY E. STAFFORD; DENISE R. STAFFORD; GOOD NEIGHBOR REAL ESTATE, INC.; TRINITY MORTGAGE CO. aka Trinity Mortgage Company of Dallas; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
SEP 13 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 23 1996

Civil Case No. 96CV 491C

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

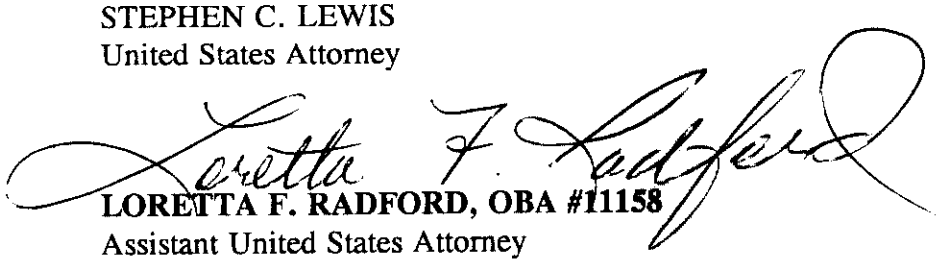
Dated this 23rd day of Sept, 1996.

UNITED STATES DISTRICT JUDGE

(4)

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
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LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUIS ARECES, Personal Representative of the Estate of MARCELO ARECES, Deceased,

Plaintiff,

vs.

THE ENSTROM HELICOPTER CORPORATION; AVCO CORPORATION, d/b/a TEXTRON LYCOMING; DANA CORPORATION; GERALD J. HAIL, d/b/a DOBIES HELIPORT; ROBERT E. RICHARDSON, an individual,

Defendants.

No. 95-C-1222-K

ORDER

Now before this Court are the Motions of Defendants, Dana Corporation and The Enstrom Helicopter Corporation to Dismiss the Complaint for Failure to Timely Serve pursuant to Fed. R. Civ. P. 4(m) (Doc. 2 & 6).

Plaintiff's claims arise out of a helicopter crash that occurred on December 19, 1993. Plaintiff filed a lawsuit on December 15, 1995, just four days short of the statutory period under Oklahoma law. Upon filing the claim in federal court, the Plaintiff failed to serve the Summons issued by the United States District Court Clerk on Dana Corporation until May 24, 1996, forty-one days after the 120 day limit imposed by Fed. R. Civ. P. 4(m). Likewise, the Plaintiff failed to serve The Enstrom Helicopter Corporation until May 28, 1996, forty-five days beyond the statutory limit. As of this date, Plaintiff has not requested an extention to timely serve pursuant to Fed. R. Civ. P.6(b).

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The Plaintiff asserts that there was good cause for his failure to timely serve, namely that because the crash occurred in Argentina, delays have resulted that are beyond the control of the Plaintiff. Although the Court recognizes the difficulty the Plaintiff must face in dealing with translation problems and investigations by a foreign government, the Court fails to see how these difficulties would inhibit the Plaintiff's ability to properly serve the Defendants. The Plaintiff had sufficient knowledge and information on December 15, 1995 to warrant filing a complaint naming the Defendants and asserting various claims against them. Thus the Court sees no reason why Plaintiff failed to timely serve the Defendants since the Plaintiff admits to knowing the identity and location of the Defendants within the relevant time period. See, e.g., Mosely v. Chromcraft Furniture, 1996 WL 408062 (N.D. Miss. 1996) (finding no good cause where plaintiff failed to serve the defendants due to the necessity of further investigation). Additionally, the Plaintiff's failure to file a motion to extend time to serve at all is 'at least some evidence of lack of diligence.'" David D. Siegel, Fed. R. Civ. P. Supplementary Practice Commentaries, C4-41 (1993) citing Quann v. Whitegate-Edgewater, 112 F.R.D 649 (D. Md. 1986).

Having determined that the Plaintiff has failed to show good cause as to why the Defendants were not timely served, the Court additionally finds no circumstances warranting the exercise of discretion to extend the time to file despite the lack of good cause. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). While it is true that the Plaintiff will merely be required to refile the claim upon dismissal,[1] failure to grant the Defendants' Motions under the facts presented merely to avoid repetitious filing would render Fed. R. Civ. P. 4(m) pointless.

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[1] Under Oklahoma law, if the Plaintiff refiles the claim within one year, it will not be barred by the statute of limitations under the Oklahoma savings statute. Okla. Stat. Ann. tit. 12 § 100 (West 1988); Ross v. Kelsey Hays, 825 P.2d 1273, 1274-75 (Okla. 1991); Moore v. Sneed, 839 P. 2d 682 (Okla. App. 1992).

For the foregoing reasons, Defendants' Motions are GRANTED and Plaintiff's claims against Defendants, Dana Corporation and The Enstrom Helicopter Corporation are hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 19 DAY OF SEPTEMBER, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEAH SULLIVAN,

Plaintiff,

v.

MID-AMERICA ACCOUNTS CONTROL BUREAU, INC.,

Defendant.

No. 96-c-305-K

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have agreed to a settlement and dismissal with prejudice of all claims, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an admistrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 19 day of September, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FOX RUN APARTMENTS, et al.

Defendants.

No. 95-C-443-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 19 day of September, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD T. CLARK,

Plaintiff,

vs.

HAKIM SIDDIQUI and
AMIRA SIDDIQUI,

Defendants.

No. 96-C-232-K

ORDER

Before the Court is the motion of defendants Hakim Siddiqui ("Hakim") and Amira Siddiqui ("Amira") to dismiss for lack of personal jurisdiction and improper venue pursuant to Rule 12(b)(2) and Rule 12(b)(3) F.R.Cv.P. The amended complaint alleges that on or about February 28, 1996, plaintiff and Hakim (acting on behalf of himself and his mother Amira) entered into an oral stock purchase agreement. The subject of the agreement is stock in Struthers Industries, Inc. ("Struthers"), a Delaware corporation with its headquarters in Tulsa, Oklahoma. Amira and Hakim are shareholders in Struthers. Plaintiff is an Oklahoma resident and defendants reside in New Jersey.

"Whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action is determined by the law of the forum state." Yarbrough v. Elmer Bunker & Assocs., 669 F.2d 614, 616 (10th Cir.1982). 12 O.S. §2004(F) provides "[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution

of the Unites States." Thus, Oklahoma's long-arm statute jurisdiction is coextensive with the constitutional limitations imposed by the Due Process Clause. Kennedy v. Freeman, 919 F.2d 126, 128 (10th Cir.1990).

The applicable standard under Rule 12(b)(2) is well established:

> We note at the outset that when the court's jurisdiction is contested, the plaintiff has the burden of proving jurisdiction exists. In the preliminary stages of litigation, however, the plaintiff's burden is light. Where, as in the present case, there has been no evidentiary hearing, and the motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written material, the plaintiff need only make a prima facie showing that jurisdiction exists. "The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits." If the parties present conflicting affidavits, all factual disputes must be resolved in the plaintiff's favor, and "the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." However, only the well pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations, must be accepted as true.

Wenz v. Memery Crystal, 55 F.3d 1503, 1505 (10th Cir.1995)(citations omitted).

In Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1074 (10th Cir.1995)(citations omitted), the Tenth Circuit outlined the general test for personal jurisdiction:

> A federal court sitting in diversity "may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state." The defendant's contacts

> with the forum state must also be such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." A defendant's contacts are sufficient if the defendant "purposefully avails itself of the privilege of conducting activities within the forum State."

The Tenth Circuit went on to note the Supreme Court has applied the constitutional standard to a contract case in Burger King Co. v. Rudzewicz, 471 U.S. 462 (1985), rejecting mechanical tests for a realistic approach which analyzes the entire relationship of the parties. "It is these factors--prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." Id. at 479.

Plaintiff must show there is either general or specific jurisdiction over the defendant. If defendant's contacts with the forum state are "continuous and systematic" they confer general jurisdiction and allow the plaintiff to litigate matters occurring outside the forum state. Dobbs v. Chevron U.S.A., Inc., 39 F.3d 1064, 1068 (10th Cir.1994). Specific jurisdiction may be asserted if the defendant has "purposefully directed" its activities toward the forum state, and if the lawsuit is based upon injuries which "arise out of" or "relate to" the defendant's contacts with the state. The contacts must be established by the defendant itself, not the unilateral activity of those who claim some relationship with a nonresident defendant. Doe v. National Medical Services, 974 F.2d 143, 145 (10th Cir.1992).

Plaintiff submitted an affidavit as part of his response to

the pending motion to dismiss. He filed a supplemental affidavit, as did defendants, pursuant to an opportunity provided by the Court at the case management conference. Plaintiff's affidavits assert the following. Plaintiff engaged in "extensive telephone conversations" with Hakim in 1995 regarding a stock purchase agreement involving Fantasia Development Inc. (Affidavit of Richard T. Clark at ¶5). Plaintiff received numerous drafts of the Fantasia agreement, sent by Hakim to Tulsa, via mail and facsimile. Plaintiff received the executed agreement on or about August 31, 1995 in Tulsa, sent by Hakim via mail and/or facsimile. (Id. at ¶¶6-7). The stock option agreement was signed by both Amira and Hakim, although Amira took no part in the negotiations. Plaintiff states it was "clearly apparent" Hakim was acting on behalf of his mother in the negotiations. (Supplemental Affidavit of Clark at ¶4.)

Further, Clark asserts he received "extensive" telephone calls in 1996 from Hakim, on behalf of himself and Amira, leading up to the alleged Struthers agreement. (Affidavit of Clark at ¶2). Based upon Clark's past experience in the Fantasia negotiations and an affirmative statement by Hakim, Clark concluded Hakim was again acting on behalf of himself and Amira. (Supplemental Affidavit of Clark at ¶¶5-6). Telephone calls between Clark in Tulsa and Hakim in New Jersey took place during the negotiations. Id. at ¶6). On or about February 28, 1996, Clark spoke to Hakim at the New Jersey plant where Hakim worked. Clark made an offer regarding the stock. Hakim stated he would confer with his mother and call back.

Approximately one half hour later, Hakim called Clark in Tulsa and stated "We accept your offer." Id. at ¶9.

Amira's affidavits relate the following. Amira is a New Jersey resident who has never entered the State of Oklahoma. She has never owned property, bank accounts or other assets in Oklahoma, and has never conducted any type of business in Oklahoma. She has never met or spoken to plaintiff. She has written two letters to plaintiff, sent from New Jersey to Tulsa. In a letter [Exhibit G to defendants' motion to dismiss] dated March 13, 1996 (i.e., after the alleged date of the alleged agreement), she stated Hakim is not an official representative or agent of the Siddiqui family and "[h]e can not make any deals on my behalf." The letter rejects plaintiff's proposal to purchase stock in Struthers. A letter [Exhibit H to defendants' motion to dismiss] dated March 18, 1996 advises plaintiff to notify Dr. Naeem Siddiqui regarding any proposals to buy Amira's shares in Struthers.

Amira states she signed the Stock Option Agreement with Fantasia based upon the negotiations of her authorized representative, Dr. Naeem Siddiqui. She denies Hakim is now or has ever been authorized to act as her agent with respect to her shares of Struthers. Amira's initial affidavit appears as Exhibit A to defendants' motion to dismiss. Her supplemental affidavit was filed in this Court July 3, 1996.

Hakim's affidavits relate the following. He is a New Jersey resident who has never entered the State of Oklahoma. He has never owned property, bank accounts or assets in Oklahoma, and has never

transacted any type of business in Oklahoma. Hakim was employed as a Sales Representative by Struthers until April 4, 1996. Hakim met Clark on one occasion in June 1995, in New Jersey. Clark was not involved in the negotiation or closing of the Fantasia agreement. Hakim received several telephone calls from Clark during the week of February 19, 1996, in which Clark offered to purchase the Struthers shares of Hakim and Amira. Hakim advised he would discuss the matter with his family, and told Clark to put the proposal in writing. Hakim received another call from Clark on or about February 28, 1996, in which Clark indicated he would be faxing a proposal to purchase Amira's shares of Struthers. Clark faxed the proposed contract; Hakim called Clark in Tulsa and rejected the contract.

Clark telephoned Hakim with another offer to purchase Amira's shares on February 29, 1996. Clark faxed a contract to New Jersey. Hakim called Clark and neither accepted nor rejected the offer. Hakim stated he needed to consult with his lawyer. Hakim has not spoken with Clark since that time. Hakim also asserts he sent one letter by facsimile to Clark on February 26, 1996 [Exhibit E to defendants' motion to dismiss]. The letter states all negotiations are to go through Dr. Naeem Siddiqui. (In his supplemental affidavit, Clark denies receiving the letter.)

To assert a prima facie case of personal jurisdiction, plaintiff cites the "long course of dealing" between himself and Hakim in both the Fantasia and Struthers transactions, and the large number of telephone calls, mailings and facsimiles between

Tulsa and New Jersey during the negotiations. Plaintiff contends that the "apparent authority" Hakim had to act as Amira's agent enables this Court to assert personal jurisdiction over Amira as well.[1] In the alternative, plaintiff asks the Court to defer its ruling until plaintiff can conduct discovery and present evidence at a pre-trial evidentiary hearing.

"Presented with a properly supported 12(b)(2) motion and opposition, the court has three procedural alternatives: it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions." Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir.1991). Upon review, the Court does not see this as a case in which limited discovery would be beneficial. The Court, as it must, accepts all plaintiff's well-pled allegations as true and resolves all factual disputes, in the affidavits and elsewhere, in plaintiff's favor. Having done so, the Court sees no benefit to discovery on the jurisdictional issue except under the surmise that discovery will produce some admission of a party directly contrary to his or her sworn affidavit, an unlikely event.

"A contract alone does not automatically establish the requisite minimum contacts necessary for the exercise of personal

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[1]At the case management conference held in this case, defendants argued that "apparent authority" is inadequate to establish a prima facie case of personal jurisdiction based upon the acts of an alleged agent. The Court disagrees. See Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 493 (5th Cir.1974); Cowart v. Shelby County Health Care Corp., 911 F.Supp. 248, 251 (S.D.Miss.1996).

jurisdiction." Gray & Co. v. Firstenberg Machinery Co., Inc., 913 F.2d 758, 760 (9th Cir.1990)(citing Burger King, 471 U.S. at 478).

Cases are abundant holding that telephone calls and written correspondence to the forum state are insufficient, of themselves, to satisfy the minimum contacts requirement of due process. See, e.g., Institutional Food Marketing Associates, Ltd. v. Golden State Strawberries, 747 F.2d 448, 456 (8th Cir.1984); Ellicott Machine Corp. v. John Holland Party Ltd., 995 F.2d 474 (4th Cir.1993); Nicholas v. Buchanan, 806 F.2d 305, 307-08 (1st Cir.1986)(citing cases). Telephone calls and letters may provide sufficient contacts, depending upon the nature of those contacts. Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1418-19 (10th Cir.1988).[2] Upon review, the Court concludes the nature of the contacts in this case does not rise to the level that personal jurisdiction is appropriate. The contract was solicited by plaintiff, and defendants have had no other contact with Oklahoma aside from responding to plaintiff.[3] No evidence has been presented that the parties contemplated that the alleged oral

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[2]Plaintiff's citation of Vinita Broadcasting Co. v. Colby, 320 F.Supp. 902 (N.D.Okla.1971) is inapposite. That district court opinion is not controlling authority, and involved an interpretation of a now-repealed Oklahoma jurisdictional statute.

[3]The Tenth Circuit has stated "[w]hether a 'party solicited the business interface is irrelevant, so long as defendant then directed its activities to the forum resident.'" Kennedy, 919 F.2d at 129 (quoting Lanier v. Amer. Bd. of Endodontics, 843 F.2d 901, 910 (6th Cir.), cert. denied, 488 U.S. 926 (1988)). However, solicitation by the defendants in the case at bar would provide stronger support for a finding of purposeful availment. Cf. Rainbow Travel Service v. Hilton Hotels Corp., 896 F.2d 1233, 1237 (10th Cir.1990).

agreement would be governed by Oklahoma law. No partial performance of any sort took place in Oklahoma. The alleged breach of contract, the refusal to sell, took place in New Jersey. In no realistic sense did defendants purposefully avail themselves of "the protection and benefits of the laws of the forum state." Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop., 17 F.3d 1302, 1305 (10th Cir.1994).

Accepting plaintiff's version of the Fantasia negotiations for purposes of this motion, a different result is not dictated. "Burger King's references to 'prior negotiations,' 'future consequences,' 'terms of the contract,' and 'course of dealing'. . . clearly contemplates dealings between the parties in regard to the disputed contract, not dealings unrelated to the cause of action." Vetrotex Certainteed v. Consolidated Fiber Glass, 75 F.3d 147, 153 (3rd Cir.1996)(emphasis in original). Even taking the Fantasia negotiations into account, a single previous transaction does not establish a "course of dealing" sufficient to establish personal jurisdiction over the defendants in Oklahoma, particularly when the "contacts" in the previous transaction are similarly tenuous to those in the disputed transaction. Nothing in the record indicates the parties contemplated future contractual relationships, another factor under Burger King.

Perhaps anticipating this view, plaintiff has alleged the tort of conversion in Count 1 of his amended complaint. For purposes of the present motion, the Court accepts the proposition that the defendants' "fail[ure] to transfer" the stock "rightfully

belonging" to plaintiff (Amended Complaint at 4, ¶¶20-21) constitutes conversion, in addition to breach of contract. Plaintiff relies on Calder v. Jones, 465 U.S. 783 (1984) for the proposition that the effect in the forum state of an action taken in a foreign state may satisfy jurisdictional requirements. In Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1077-78 (10th Cir.1995), the Tenth Circuit appeared to reject any broad "effects" test under Calder. The Court of Appeals stated "those courts finding personal jurisdiction based upon an intentional tort analysis have not created a per se rule that an allegation of an intentional tort creates personal jurisdiction. Instead, they have emphasized that the defendant had additional contacts with the forum." Id. at 1078. In the case at bar, those additional contacts are not present. A prima facie showing of "specific jurisdiction" is lacking as to both Hakim and Amira. Plaintiff has made no argument that "general jurisdiction" exists over the defendants. Dismissal is appropriate.

In the interest of thoroughness, the Court will proceed to briefly address the issue of venue. The view that plaintiff bears the burden of proof "seems correct inasmuch as it is plaintiff's obligation to institute his action in a permissible forum, both in terms of jurisdiction and venue." 5A C. Wright & A. Miller, Federal Practice and Procedure, §1352 at 265 (2d Ed.1990).

28 U.S.C. §1391(a)(2) provides, in diversity cases, a civil action may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the

claim occurred. . . ." Under the statute, amended in 1990, "it is now absolutely clear that there can be more than one district in which a substantial part of the events giving rise to the claim occurred." 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3806 at 16 (supp.1996). Under the amended statute, the Court no longer asks which district among two or more potential forums is the "best" venue, but rather whether the district the plaintiff chose has a substantial connection to the claim, whether or not other forums had greater contacts. Setco Enterprises Corp. v. Robbins, 19 F.3d 1278, 1281 (8th Cir.1994). However, "[s]ubstantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." Cottman Transmission Systems, Inc. v. Martino, 36 F.3d 291, 294 (3rd Cir.1994).

Plaintiff wishes this Court to aggregate the telephone, written and wire facsimile communications between the parties and find the Northern District of Oklahoma has a substantial connection to the claim. Plaintiff also argues for a "financial impact" theory of venue, similar to his argument for an "effect" test regarding personal jurisdiction. The Court declines to adopt plaintiff's arguments. The contention for venue is based primarily upon the happenstance that plaintiff resides in the Northern District of Oklahoma. The communications from the Siddiquis to the State of Oklahoma were largely responses to unsolicited offers by plaintiff. Venue cannot be manufactured by the unilateral activities of the plaintiff. The communications from the Siddiquis

may have been "substantial" in number, but they do not form a substantial part of the acts or omissions giving rise to the claim occurred. Those alleged acts or omissions took place in New Jersey. Dismissal or transfer based on improper venue would also be appropriate.

It is the Order of the Court that the motion of the defendants to dismiss (#5) is hereby GRANTED.

ORDERED this 19 day of September, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
AMERICAN BEAUTY PRODUCTS COMPANY, INC.	)	BANKRUPTCY COURT CASE NO. 95-01875-W
Debtor,	)	
UNITED STATES OF AMERICA,	)	DISTRICT COURT CASE NO. 96-C-208-H
Appellant,	)	
vs.	)	
AMERICAN BEAUTY PRODUCTS COMPANY, INC.,	)	
Appellee.	)	

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation filed August 9, 1996 [Dkt. 7]. **THE COURT ORDERS THAT THIS APPEAL BE DISMISSED AS MOOT** as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 19th day of September 1996.

SVEN ERIK HOLMES
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAMES E. SANDERS and LYDA R. SANDERS, husband and wife,

Plaintiffs,

vs.

CLECO LTD., a foreign corporation, CLECO SYSTEMS, a division of OWEN INDUSTRIES, INC., an Iowa corporation,

Defendant.

Case No. 94-C-1141-H

ENTERED ON DOCKET

DATE SEP 23 1996

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for hearing on the Joint Stipulation of the Plaintiffs, James E. Sanders and Lyda R. Sanders, and Defendant, Cleco Ltd. for a dismissal with prejudice of the above captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendant, Cleco Ltd., pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendant, Cleco Ltd., be and is hereby dismissed with prejudice to the filing of a future action against said Defendant, the parties to bear their own respective costs.

Dated this 19TH day of SEPTEMBER, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT COURT JUDGE

G:\LIT\1174\1\PLEADING\DISMISSA.ORD

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 94-C-1006-BU
	)	
PROCEEDS FROM THE SALE OF REAL PROPERTY KNOWN AS: 3509 SOUTH FLORENCE, TULSA, OKLAHOMA, IN THE AMOUNT OF FIVE THOUSAND FIVE HUNDRED SEVENTY-NINE AND 39/100 DOLLARS ($5,579.39),	)	
	)	
Defendant.	)	

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against the defendant proceeds, and all entities and/or persons interested in the defendant proceeds, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 26th day of October, 1994, alleging that the defendant proceeds, to-wit:

> **PROCEEDS FROM THE SALE OF REAL PROPERTY KNOWN AS: 3509 SOUTH FLORENCE, TULSA, OKLAHOMA, IN THE AMOUNT OF FIVE THOUSAND FIVE HUNDRED SEVENTY-NINE AND 39/100 DOLLARS ($5,579.39),**

are subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A), because there is probable cause to believe they are properties

involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or proceeds traceable thereto, and pursuant to 18 U.S.C. § 981(a)(1)(C), because they constitute proceeds or are derived from proceeds traceable to a violation of 18 U.S.C. § 1343, in violation of Title 18 United States Code.

Warrant of Arrest and Seizure was issued by the Clerk of this Court on the 26th day of October, 1994, providing that the United States Marshal for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of Arrest and Notices In Rem on the defendant proceeds and all known potential individuals or entities with standing to file a claim to the defendant proceeds, as follows:

a)	**Proceeds From the Sale of Real Property Known As: 3509 South Florence, Tulsa, Oklahoma, In the Amount of Five Thousand Five Hundred Seventy-Nine and 39/100 Dollars ($5,579.30).**	**Served: November 18, 1994**

b)	Noel W. Smith, a/k/a Wayne Smith, N. W. Smith, and N. W. Culpepper, by serving Stanley D. Monroe, his attorney, (who was authorized to accept service) 1515 South Denver Tulsa, Oklahoma 74119	Served: November 28, 1994
c)	Pat S. Smith, a/k/a Pat S. Stinnett, by serving Stanley D. Monroe, her attorney, (who is authorized to accept service) 1515 South Denver Tulsa, OK 74119	Served: November 28, 1994

USMS 285s reflecting the service upon the defendant proceeds and upon Noel Wayne Smith, a/k/a Wayne Smith, N. W. Smith, and N. W. Culpepper, by serving Stanley D. Monroe, his attorney, (who was authorized to accept service); and upon Pat S. Smith, a/k/a Pat S. Stinnett, by serving Stanley D. Monroe, her attorney, (who was authorized to accept service), the only individuals or entities known to have standing to file a claim to the defendant proceeds are on file herein.

All persons or entities interested in the defendant proceeds were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed on December 1, 8, and 15, 1994. Proof of Publication was filed on December 28, 1994.

No claims in respect to the defendant proceeds have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to the defendant proceeds, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant proceeds, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant proceeds:

PROCEEDS FROM THE SALE OF REAL PROPERTY KNOWN AS: 3509 SOUTH FLORENCE, TULSA, OKLAHOMA, IN THE AMOUNT OF FIVE THOUSAND FIVE HUNDRED SEVENTY-NINE AND 39/100 DOLLARS ($5,579.39),

and that the defendant proceeds above described be, and they are, hereby forfeited to the United States of America for disposition according to law.

s/ MICHAEL BURRAGE

MICHAEL BURRAGE
JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LeCHARLIE J. MARKHAM,
By and Through His Mother and
Next Friend, LaShonida Horn,
SS# 441-04-4947,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of the Social Security
Administration,

Defendant.

NO. 95-C-723-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 20th day of Sept, 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LeCHARLIE J. MARKHAM, By and Through His Mother and Next Friend, LaShondia Horn, SS# 441-04-4947	)	
PLAINTIFF,	)	
vs.	)	**CASE NO. 95-C-723-M**
SHIRLEY S. CHATER, Commissioner of the Social Security Administration,[1]	)	
DEFENDANT.	)	

ORDER

Plaintiff, LaShondia Horn, on behalf of her son, LeCharlie J. Markham, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the

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[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

[2] *Plaintiff's July 6, 1993 application for Supplemental Security Income was denied October 12, 1993, the denial was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held August 10, 1994. By decision dated September 8, 1994, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 1, 1995. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.*

issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

A four-step sequential evaluation process is required to determine whether a child is disabled. Under this evaluation process the ALJ must consider the following issues: (1) whether the child has engaged in substantial gainful activity, (2) whether the child's impairment or impairments are so severe as to cause more than a minimal limitation on the child's ability to function in an age-appropriate manner, (3) if the impairment in severe, whether it meets or equals an impairment listed in Appendix 1, Subpart P of 20 C.F.R. Part 404, and (4) if the child's impairment does not meet or equal a listed impairment, whether the impairment is of comparable severity to an impairment that would disable an adult. At the fourth step, an individualized functional assessment (IFA) is performed based on the ALJ's evaluation of all of the evidence in the child's claim. To be disabled, the child's impairments must "substantially reduce [his] physical or mental ability to function independently,

appropriately and effectively in an age-appropriate manner" and his impairment(s) must meet the durational requirement. 20 CFR § 416.924.

At the time of the hearing Plaintiff, born December 5, 1992, was 20 months old. His mother claims that he has been disabled since birth due to achondroplastic dwarfism and asthma. The ALJ determined that although the medical evidence demonstrates that Plaintiff is of short stature for his age and has respiratory problems necessitating use of a nebulizer, these conditions do not meet the criteria for any listed impairment, nor have they affected his ability to function as a normal child. Therefore the ALJ determined that Plaintiff was not under a disability as defined in the Social Security Act.

On appeal Plaintiff alleges the ALJ erred by failing to find that his impairment met or equaled the Listings of Impairments found in 20 C.F.R. Pt. 404, Subpt. P., App.1. Specifically, Plaintiff argues that he meets the criteria for Listing 100.02 for growth impairments, the text of which follows:

> 100.02 *Growth impairment*, considered to be related to an additional specific medically determinable impairment, and one of the following:
>
> A. Fall of greater than 15 percentiles in height which is sustained; or
>
> B. Fall to, or persistence of, height below the third percentile.

According to Plaintiff, achondroplasia is defined as a growth impairment and the diagnosis of achondroplasia is the "additional specific medically determinable impairment" required by Listing 100.02. Since the medical records demonstrate that

Plaintiff's height has persistently been below the third percentile, Plaintiff maintains that the criteria for Listing 100.02 were met and that a finding of disability was therefore required. The Court is not persuaded that Plaintiff's interpretation of §100.02 is a correct one.

According to the relevant regulations, the Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Each section of the Listings has a general introduction containing definitions of key concepts used in that section. In addition, the narrative introduction will contain certain specific medical findings which are required to establish a diagnosis or to confirm the existence of an impairment for the purpose of that Listing. 20 CFR § 416.925.

Section 100 is the introduction to the Listings for growth impairments. Section 100 explains: "Impairment of growth may be disabling in itself or it may be an indicator of the severity of the impairment due to a specific disease process." The criteria for when a growth impairment is considered to be "disabling in itself" are set forth in Listing 100.03. Listing 100.02 contains criteria for growth impairment when that growth impairment is "related to an additional specific medically determinable impairment."

The issue in this case boils down to whether a diagnosis of achondroplastic dwarfism together with the height criteria of Listing 100.02 will satisfy the requirements for that Listing. Achondroplasia is the diagnosis that describes Plaintiff's particular growth impairment. In the context of Listing 100.02 it is not an

impairment in addition to Plaintiff's short stature. The criteria for determining that the diagnosis of achondroplasia is "disabling in itself" is found in Listing 100.03 and requires a medical determination of "[b]one age greater than two standard deviations (2 SD) below the mean for chronological age (see 100.00B)." Section 100.00B requires a "full descriptive report of roentgenograms specifically obtained to determine bone age." The record does not contain roentgenogram reports, nor does Plaintiff claim that he meets the criteria for Listing 100.03. The ALJ's finding that "the medical evidence demonstrates that the claimant does not meet the criteria specified in sections 100.02 and 100.03" [R. 15] and therefore does not meet the Listings is supported by substantial evidence.

Plaintiff also argues that the ALJ erred by determining that Listing 100.00 "precludes meeting any of the listings based on inherited shortness of stature." [R. 15]. Section 100.00, the narrative introduction to the growth impairment listings, provides that determinations of growth impairments are to be based upon the comparison of current height with at least three previous determinations. Section 100.00 further instructs that the adult heights of the child's natural parents and heights and ages of siblings should also be obtained to provide a basis to determine whether short stature represents a familial characteristic rather than the result of a disease. Because Plaintiff's mother, being 3'8" and diagnosed with achondroplasia,[3] is of short stature, the ALJ stated that § 100.00 precluded Plaintiff from meeting the

[3] See Record pages 92-94.

Listings. Despite this erroneous conclusion by the ALJ, the denial decision is clear that denial of benefits was not based on the ALJ's interpretation of § 100.00. The ALJ stated, "[i]n any event, the medical evidence demonstrates that the claimant does not meet the criteria specified in sections 100.02 and 100.03." [R. 15]. As previously discussed, the conclusion that Plaintiff does not meet the Listings is supported by substantial evidence.

There is substantial evidence in the record to support the ALJ's determination that Plaintiff is not under a disability as that term is defined in the Social Security Act as applied to children. 42 U.S.C. § 401, et seq; *Sullivan v. Zebley,* 493 U.S. 521, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990); 20 C.F.R. § 416.924. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 20th day of September, 1996.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE